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REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS.

BY

GEORGE FREDERICK HARMAN,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q. C.,

EDITOR.

VOL. XXIV.

CONTAINING THE CASES DETERMINED
FROM HILARY TERM, 37 VICTORIA, TO HILARY TERM, 38 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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OF THE
COURT OF COMMON PLEAS.

THE HON. JOHN HAWKINS HAGARTY, C. J.
“ “ JOHN WELLINGTON GWYNNE, J.
“ “ THOMAS GALT, J.

Minister of Justice :

THE HON. EDWARD BLAKE.

Attorney-General :

THE HON. OLIVER MOWAT.

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IN THE

COURT OF COMMON PLEAS.

HILARY TERM, 37 VICTORIA, 1874.

(2nd February to 14th February.)

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ THOMAS GALT, J. (a)

McKENZIE ET AL. V. KITTRIDGE ET AL.

Joint stock Co.—Liability of stockholders—Payment of stock—Registration of certificate—C. S. C. ch. 63—Construction of.

In an action against defendants as stockholders of a joint stock company incorporated under C. S. C. ch. 63, debts incurred by the company to plaintiffs, the declaration averred that the whole amount of the capital stock had not been paid in, nor a certificate to that effect, signed and sworn to by a majority of the trustees of the company, registered in the registry office of the county, nor had the defendants paid up the full amount of their shares, nor made nor registered a certificate to that effect as required by the Act.

Held, good, for it was unnecessary to negative the registration of a certificate, under sec. 46, of the payment in full of the capital stock, and the requirements of sec. 35, which were negotiated, could not be dispensed with in the case as stated in the declaration.

Quære, as to the application and meaning of sec. 46.

The defendants' first plea alleged that they were not, at the respective times when the debts were made or contracted, or at any time from thence until the commencement of this suit, stockholders in the company. *Held* good, not being open to objection as tendering an immaterial issue, whether defendants were stockholders at the commencement of this suit, for the averment as to that could not prejudice or embarrass the plaintiff.

(a) GWYNNE, J., took no part in the proceedings of this term, being absent on leave.

The replication to the first plea alleged, that although the defendants did transfer their shares to other parties, the balance due thereon has not been paid in, as required by the Act. *Held*, bad, for under secs. 29 and 30 if all previous calls had been paid, the defendants might transfer; and without such payment they could not transfer, and would remain stockholders.

The second plea alleged that within five years after incorporation defendants paid up their full shares, and thereafter and before suit, namely, 1st October, 1873, a certificate to that effect was signed and sworn to by a majority of the trustees, including the president, before the registrar, and was on the same day duly registered, as prescribed by the Act.

Held, good, without alleging that it was filed within thirty days, for that the limit, prescribed by sec. 35, applies to the general payment in full of the stock, not to payment by one individual shareholder; and that it was unnecessary to shew that defendants paid up within the time mentioned in the declaration of incorporation, or that the certificate was filed before the contracting of the debts sued for.

Under sec. 33 as soon as a shareholder has paid up his full shares, and registered the certificate prescribed his liability ceases, except in the cases specified in the Act, and this notwithstanding sec. 34, which owing to the manner in which the previous Statutes have been consolidated, is apparently inconsistent.

DECLARATION: that on the 15th October, 1873, the plaintiffs, in the Court of Common Pleas for Ontario, recovered a judgment against the Strathroy Woollen Manufacturing Company for \$12,744.21, damages, and \$66.75, costs; and thereupon, on the said 15th October, 1873, the plaintiffs caused to be issued out of the said Court, upon the said judgment, an execution against the said Company, directed to the sheriff of the County of Middlesex, and which said execution, before the commencement of this suit, was by the said sheriff returned unsatisfied, and the said judgment is wholly unsatisfied. And the plaintiffs aver that the said Strathroy Woollen Manufacturing Company is a manufacturing company duly incorporated under the provisions of the statute, chapter sixty-three of the Consolidated Statutes of Canada, carrying on their operations in the town of Strathroy, in the County of Middlesex aforesaid, and having a capital stock of \$75,000, in 750 shares of \$100 each, payable within twenty months after the first day of October, 1869, in calls not to exceed the rate of ten per cent. every two months after the said last mentioned date till paid up: that the said company was continued a

joint stock company under the said Act from the said month of October, 1869, until after the commencement of this suit: that the said judgment was not recovered for or in respect of a debt contracted by the said company with the plaintiffs, which was not to be paid within one year from the contracting thereof, and was recovered in respect of a certain debt due and owing by the said company to the plaintiffs upon certain promissory notes, made by the company to certain persons, and endorsed to the plaintiffs—setting out the notes, and averring nonpayment. And the plaintiffs further aver that the action in which the said judgment was recovered, was brought and commenced against the said company within one year after the debts became due; and the defendants before the several debts were and each of them was contracted, and before this action was commenced, subscribed for and became and were, and each of them was, at the commencement of this suit, stockholders of the said company; and that the whole amount of the capital stock of the said company, fixed and limited as aforesaid, has not been paid in, nor has a certificate to that effect, signed and sworn to by a majority of the trustees of the said company, been registered in the registry office of the County of West Middlesex, being the county wherein the business of the said company has been or is carried on; neither have the defendants paid up the full amount of their shares in the capital stock of the said company, nor made or registered a certificate to that effect, as prescribed by the said Act. By means whereof, and by force of the statute in that behalf, an action hath accrued to the plaintiffs to demand from the defendants, as such stockholders as aforesaid, the amount of the said judgment so recovered by the plaintiffs against the said company.

Demurrer to the declaration. 1. That it does not, as it should, negative the registration of a certificate of the payment in full of the capital stock of the company, signed by and verified by the affidavit or affirmation of the president, or vice-president, or one of the trustees of the company.

2. That it does not disclose any cause of action against the defendants. 3. That it does not, as it should, contain an allegation that the defendants have not paid the amount of the debt in the declaration mentioned.

Pleas. 1. That the defendants were not at the respective times when the debts in respect of which the promissory notes in the declaration mentioned were made, or any or either of them were contracted, or at any time from thence until the commencement of this suit, or at the time of the commencement of this suit, stockholders in the said company.

2. That the debts in the said declaration mentioned were not nor were any or either of them, or any part thereof, debts due or owing to any of the labourers, workmen, or apprentices of the said company, for services performed for the said company : that within the period of five years from the incorporation of the said company they paid up their full shares in the said company, and that thereafter, and before the commencement of this suit, to wit, on the 1st October, 1873, a certificate to that effect was made and drawn up, which certificate was signed and sworn to by a majority of the trustees of the said company, including the president, before the registrar of the West Riding of the said County of Middlesex, the same being the district or county wherein the business of the said company was then carried on, and was on the said 1st October, 1873, duly registered in the registry office for the said West Riding of the said County of Middlesex, in manner prescribed by the statute in that behalf.

Third replication to first plea : that although the defendants did transfer the shares held by them to certain other parties, the balance due thereon has not been paid in as required by the said Act.

Fourth replication to second plea : that the said certificate was not made or drawn up, or registered, within the time by the said Act limited and prescribed.

Demurrer to third replication to first plea. 1. That it is no answer in law to the said first plea. 2. That it is

consistent with the allegations contained in the said third replication, that the default alleged in the said third replication took place after the transfer by the said defendants of their shares.

Demurrer to fourth replication to second plea, 1. That no time is by the Act in the said replication referred to limited and prescribed for the making, drawing up, and registration of the said certificate. 2. That the registration of the said certificate before the commencement of this action was a sufficient registration thereof.

The plaintiff joined in demurrer, and took the following exceptions to the pleas:—To the first plea: That it is defective in tendering an issue which is immaterial, to wit, whether the defendants were stockholders in the company at the time of the commencement of this suit. To the second plea: That it is not shewn that the stock was paid up within the time mentioned in the declaration of incorporation, or that the certificate was filed within the time prescribed by law, or before the contracting of the debt to the plaintiffs, and the plea tenders an immaterial issue, and the traverse thereby tendered is too large.

Meredith, for the defendants. The declaration should have negatived the certificate under sec. 46 (a), as this section applies to the original as well as the new stock. It also should have averred that the defendants have not paid the debt. The fact of defendant not being stockholders at the commencement of the suit was material and cannot prejudice the plaintiffs. The third replication to the first plea is bad, for the default may have taken place after the transfer. Under secs. 29 and 30, Consol. Stat. C., ch. 63, the shares are transferable, and on such transfer the shareholder is relieved from liability, and the subsequent default of the transferee cannot revive his liability. The second replication to the second plea is bad, as there

(a) The sections of the statute referred to on the argument will be found sufficiently stated in the judgment.

is no time limited by the statute for the making or filing the certificate, and it need not be filed before the debt is contracted ; but the registration before action brought is sufficient. Under sec. 33 it may be drawn up and registered at any time before action brought, and the reference to sec. 35 applies to the manner of registration, and not to the time ; the thirty days limit applying to the payment in full by the company, and not by an individual shareholder ; and when the certificate is made and registered, the shareholder is relieved from all liability, and there is no exception as to existing debts. The facts of the words used in sec. 33, " except as hereinafter mentioned," do not refer to sec. 34, and make the stockholder liable until the whole of the capital stock has been paid, and the inconsistency between the two sections arose from the consolidation of the two statutes 13 & 14 Vic. ch. 28, and 16 Vic. ch. 172. In all the subsequent statutes the shareholder is relieved from liability on paying up his stock, and registering the certificate.

Burton, Q. C., and Robertson, Q. C., contra. The declaration is good, as it negatives any certificate under sec. 35, and that is all that is required, sec. 46 applying only to new stock. The allegation in the declaration that the judgment still remains unsatisfied, amounts to an averment that the debt has not been paid. However, this should be set up by way of defence. The allegation that the defendants were not stockholders at the commencement of the action raises an immaterial issue, as it is only necessary for plaintiffs to prove that they were stockholders when the debt was contracted : *Wms. Saund*, ed. 1871, vol. ii. 615 ; *Smith v. Lovell*, 10 C. B. 7, 23. The third replication to the first plea is good. The intention of the Legislature was, that the original stockholders should be liable until the whole amount of the stock should be paid, otherwise persons might start a company and then transfer their shares to worthless persons, and so release themselves from liability, but the Legislature makes them guarantee the solvency of the company. The second replication to the

second plea is good. The registration of a certificate before action is not sufficient, but under section 35 it must be within thirty days after payment, and payment must be made within the time mentioned in the declaration, and the certificate must be filed before the debt is contracted. The words in section 33, "except as hereinafter mentioned," clearly shew that section 34 is referred to, and that the liability is not to cease until the whole of the stock is paid up.

HAGARTY, C. J.—The declaration avers that the whole amount of the capital stock of the company has not been paid in, nor has a certificate to that effect, signed and sworn to by a majority of the trustees of the said company, been registered in the registry office of the county, &c. ; neither have the defendants paid up the full amount of their shares in the capital stock of the said company, nor made nor registered a certificate to that effect, as prescribed by the said Act.

The only objection to the declaration requiring notice is, that it does not negative the registration of a certificate of the payment in full of the capital stock, signed and verified by the affidavit or affirmation of the president, or one of the trustees of the company.

Consol. Stat. C. ch. 63, sec. 35, declares that within thirty days after the payment of the last instalment of the capital stock, &c., there shall be drawn up a certificate to that effect, which certificate shall be signed and sworn to by a majority of the trustees of the company, including the chairman or president. This section is referred to in sections 33 and 34, and seems to be the necessary course to be adopted to prove the payment in full of the stock.

Section 46, one of a set of sections headed "Provisions for increasing the capital stock," enacts that, "All certificates of the payment of stock in any such company shall be signed and verified by the affidavit or affirmation of the president or vice-president, or in his absence, of one of the trustees of the company, and thereupon the same shall be registered by the" registrar, &c., "without any further signature, or the affidavit of any other person."

Whether this section was intended to apply to the case of a certificate of payment of the whole capital stock, or merely to a payment of the stock of an individual shareholder, or of new stock, need not be further discussed, as we cannot think the requirements of the 35th section can be dispensed with in the case as stated in the declaration, and therefore we uphold the declaration against this objection, coupled as the averment is with a statement that the full amount of the capital stock has not been paid up.

The first plea avers that the defendants were not at the respective times when the debts mentioned in the declaration were contracted, or at any time from thence until the commencement of this suit, stockholders in the said company. This plea is objected to as tendering an immaterial issue, namely, whether the defendants were stockholders at the commencement of the suit.

We think this objection fails. The issue offered by the plea is simple and intelligible, and the averment as to being stockholders at the commencement of the suit, can in no way prejudice or embarrass the plaintiffs.

To this plea the plaintiffs also reply, "that although the defendants did transfer the shares held by them to certain other parties, the balance due thereon has not been paid in as required by the said Act."

The defendants demur to this on the ground that the default alleged may have taken place after the transfer by the defendants of their shares.

Section 29 declares the stock to be "assignable and transferable in such manner as shall be prescribed by the by-laws of the company."

Section 30 declares that "no shares shall be transferable until all previous calls have been fully paid in, or until the shares have been declared forfeited for the non-payment of the calls thereon."

We think this objection is sound. If the plaintiffs' view be correct, then, although all the calls made have been duly paid, a shareholder cannot transfer his shares, or cease to be a stockholder, and subsequent defaults in the transferee would continue or revive his liability.

If the replication had been, that at the time of the pretended transfer the previous calls had not been paid up, it would, we presume, amount to an argumentative traverse of the defendants being stockholders. They either continued stockholders, or ceased so to be, and their liability depends on how this may be.

The defendants' second plea, after averring that the debts were not due to labourers, workmen, &c., states that within five years from the incorporation of the company, they paid up their full shares in the company, and that thereafter, and before this suit, namely, on 1st October, 1873, a certificate to that effect was made, &c., signed and sworn to by a majority of the trustees of the company, including the president, before the registrar, &c., being the county, &c., and was on the same day duly registered in said office as prescribed by the statute.

To this the plaintiffs reply that the certificate was not made or drawn up within the time limited by the statute.

They also object to the plea as not shewing that the stock was paid up within the time mentioned in the declaration of incorporation, or that the certificate was filed within the time prescribed by law, or before the contracting of the debt to the plaintiffs, and that it tenders an immaterial issue, and the traverse is too large.

The defendants demur to the replication, on the ground that no time is limited for the making or filing the certificate, and that registration before the commencement of this action is sufficient.

Section 33 declares that any shareholder may at any time within five years from the incorporation of the company pay up his full share in the company, and a certificate to that effect shall be made and registered as prescribed in section 35, after which the shareholder shall not, except as thereafter mentioned, be liable, &c., beyond the amount of his share in the capital stock so paid up as aforesaid.

The plea shews a registration of a certificate according, as we think, to the requirements of the 35th section. The plaintiffs object that this certificate was not made within

the limited time. The section directs that within thirty days after the last instalment of the capital stock, the certificate shall be made and registered. But we do not consider that this thirty-day limit applies to the case of the individual shareholder paying up his stock in full, but to the general payment in full of the capital stock. The shareholder, within the five years, pays up in full and registers, as directed by the 35th section. We therefore think this objection fails.

It cannot, we think, be necessary for the defendants to shew in such a plea that they paid up their stock within the time mentioned in the declaration of incorporation. The record shews nothing on this subject, and the statute is equally silent.

Nor can we hold it necessary to state that the certificate was filed before the contracting of the debt sued for.

Section 33 declares that after the making and registering of the certificate, the shareholder shall not be liable for or charged with any debt or demand due by the company. On the face of this record the registration was effected before the suit commenced, and therefore it seems to us the shareholder ceases to be liable for or charged with the debts.

The meaning of the whole section would seem to be very clear,—that as soon as the shareholder has paid up his full contribution to the general fund, his liability should cease, except in certain specified cases; and there is no exception as to existing debts. A different construction would defeat the apparent object of allowing a limited instead of a general liability.

The objection as to tendering an immaterial or too large a traverse seems quite untenable. The plea only states sufficient to make a good defence.

This section 33 is followed by section 34, which seems inconsistent with it. It provides that the stockholder shall be liable for all the debts of the company, until the whole amount of the capital stock has been paid in, and a certificate made and registered under the next section, 35.

If this were to prevail over section 33, allowing any shareholder to pay up in full and thereby escape further liability, the whole intention of a statute allowing a limited liability would be defeated.

The incongruity of the two sections seems to have arisen from the manner in which two statutes were consolidated,

The first Act, 13-14 Vic. ch. 28, 1850, contains a clause, from which sec. 34 of the Consolidated Act is taken, that all the stock must be paid up to allow a limitation of the liability.

In 1853, 16 Vic. ch. 172, was passed to amend the first Act.

Section 2 says, that notwithstanding anything in the preceding Act contained, it should be lawful for any shareholder within five years to pay up his full shares, and on a certificate to that effect being made and registered, it should, as to such shareholder, and his liability in virtue of the Act, have the same force and effect from the making thereof, as the making and registering of the certificate of the payment of the whole amount of the capital stock.

The Consolidated Act of 1859, rather infelicitously, re-enacts each clause, omitting the important provision just cited, that the registration in the case of the single shareholder shall, as to him, have the same effect as the registration of the certificate of the whole stock being paid up.

We think we must hold the liability to be restricted to the amount of each man's stock. We are directed by the Act effecting the Consolidated Statutes, 22 Vic., ch. 29 sec. 8, that the Consolidated Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation, and as declaratory of the law as contained in the Acts repealed, and for which the Consolidated Statutes are substituted.

All the subsequent Acts as to companies of this character contain clauses restricting the liability to the amount of the subscription.

It could not, we think, be intended that the payment in full should not bar liability for existing, as well as future debts.

A call might be made expressly to meet existing debts, and it would seem to be contrary to the general design and bearing of all these enactments to hold that where a subscriber pays in full he should, in effect, be held liable to guarantee the payment in full of all the other shareholders.

We direct that there be judgment for the plaintiff on the objections to the declaration, and for defendants on the demurrers to the pleas and replications.

GALT, J., concurred.

GWYNNE, J., was not present at the argument, and took no part in the judgment.

Judgment accordingly.

FREE V. MCHUGH.

Separate Protestant schools, establishment of.

Held, under C. S. U. C., ch. 65, sec. 3, and ch. 64, sec. 40, that the by-law of a township council authorizing the establishment of a Protestant separate school, on the ground that the teacher of the public school is a Roman Catholic, does not come into effect or the school into existence until the 25th December following.

Held, also, that the appointment of a Protestant teacher to the public school before that day enabled the municipality to repeal the by-law, but did not, of itself, put an end to the separate school.

No return was made by the local superintendent, under sec. 13 of ch. 65, of the supporters of the separate school for the preceding six months, to the public school trustees; and they, acting under the assessment roll for the year, where all the ratepayers of the section were entered, including the separate school supporters, of whom the plaintiff was one, levied a rate on all in the section for teacher's salary and other ordinary expenses of the public school, and also the amount payable within the year of the cost of a new school-house, the construction of which was undertaken before the 25th December, and issued a warrant for its collection to defendant, their collector. The plaintiff brought detinue for his property seized under this warrant, the facts being stated in a special case without pleadings.

Held, that the public school trustees were not bound to exclude the names of the separate school supporters from their rate, as they had not notice of any exemptions, either by a return from the local superintendent or the assessment roll.

Held, also, that under ch. 65, sec. 8, the supporters of the separate school were liable for the public school rates for the new school-house, as it was undertaken before the separate school was established; but that this portion of the levy being correct would not make valid the whole levy, which was for one sum or rate, including several items.

Held, also, that the fact of the separate school having received a share of the legislative school grant could not affect the case.

Held, also, though there were no formal pleadings, that the defendant was not protected, as having acted under a warrant, apparently lawful, but that he must be considered an actor, and must shew a title to the property.

Seemle, that separate Protestant school trustees have no power to build school-houses or impose rates therefor.

Quaere, as to the meaning of "school-rolls" in sec. 14 of ch. 65.

SPECIAL CASE.

THIS was a special case stated for the opinion of the Court, of which the material facts were as follows:

The action was said to be detinue brought against the collector of public school rates, in common school section No. 6, township of Ops, to recover possession of certain property seized by him in payment of school rates, under the warrant of the public school trustees of the said section, but no formal pleadings were stated.

For many years previous and up to the end of 1872, the teachers of the common school had been Roman Catholics.

On the 20th January, 1872, an application in writing was made by upwards of twelve heads of families, resident within the said section, and who were Protestants, to the Municipal Council of the township of Ops, for a separate school. Upon the said 20th January, at a special meeting of the Council called for that purpose, a by-law was passed authorizing the establishment of a separate school for Protestants. The limits of the section were to be the same as the common school section No. 6, with the addition of lot No. 10 in the 6th concession of Ops, and to be known under the name of Separate School Section No. 1, in the township of Ops.

At a meeting held on the 3rd December, 1872, three trustees for such separate school were elected.

In January, 1873, at the regular meeting of the separate school section, a trustee was elected, in the place of the trustee who retired; and an agreement was signed between the trustees and a teacher for the separate school. The separate school was opened, and teaching commenced on 7th January, 1873. The building occupied by the separate school-house, and in which the separate school was opened, was purchased by the trustees of the separate school section in 1872, as again mentioned below.

On 28th June, 1873, the trustees of the separate school transmitted to the Public School Inspector a half-yearly return of the attendance of pupils at the separate school. There was a return made of the names of the petitioners for and supporters of the separate school. This return was made up by the trustees of the separate school, copying the names from the collector's roll, and placing after each name the amount of taxes paid to the public school in the year 1872. The name of the plaintiff appeared on the said return. The local superintendent, upon receipt of this return, forthwith made a return to the clerk of the Municipality, his return being merely a copy of the return made to him, and which copy he certified as a true copy, and handed it to the clerk. He made no return to the trustees.

On the 3rd July, 1873, the trustees of the separate school made their half-yearly return to the public school inspector, and received their share of the Legislative school grant, the separate school having been recognized by the Chief Superintendent, and received maps and apparatus from the government office.

On the 15th January, 1872, the trustees of public school section No. 6 held a special meeting, at which it was agreed to build a new school-house, and to call a special public meeting of the ratepayers to change the school site.

On the 23rd January, 1872, a special public meeting of the public school section was held, due notice having been given, as required by law, and a new site was chosen.

On the 18th of May a contract for the erection of a new school-house was entered into, and the building proceeded with.

On the 21st September the public school trustees sold the old school-house, which was purchased by or on account of the trustees of the separate school.

On the 16th November, 1872, the trustees of the public school engaged a Protestant teacher, but this person did not fulfil his engagement.

On the 24th December they engaged another teacher, who was a Protestant, his engagement taking effect from the 7th January, 1873, at which date he commenced to teach, and has continued to teach there ever since.

On 4th January, 1873, the Public School Inspector sent to James Milligan, the secretary-treasurer of the separate school, a notice of the engagement of said teacher, and notifying him that a Protestant separate school could not share in the Legislative grant until a Roman Catholic teacher was employed in the public school of said section.

The public school had always, prior to the year 1873, been supported by rates levied by the municipal council, at the request of the trustees.

At the August meeting, in 1873, of the township council it was suggested to the trustees of the public school that the trustees should not apply to the council to collect their rate, but should employ their own authority therefor. One

of the councillors who resided in the said section, and was present at such meeting, had notice of the return of the names of the separate school (supporters), having seen said return at the residence of the school inspector, between the 28th June and 12th July, and afterwards, and before the said meeting of the council, he informed the trustees of school section No. 6 thereof, saying he had seen the return of separate school section No. 1, and that it was false. The trustees levied upon the whole property in the section, as well that of those claiming to be supporters of the separate school, as that of the other ratepayers, a rate which included the expenses of the public school for the teacher's salary, and all other ordinary expenses of the school, and also so much of the costs of the new school-house as was payable within the year, and a warrant for the collection thereof was given to the defendant.

In the assessment roll for the year 1873, the ratepayers of the section were all entered as of section No. 6, without any notice being taken of the separate school. The supporters of such separate school objected to such assessment, but did not appeal against it.

The defendant, as the collector of the trustees of the public school, distrained the property of the plaintiff under the said assessment, and this action was brought by reason of that distress.

A copy of the warrant was attached to the special case, and it directed the collection to be made "from the several individuals on the annexed rate bill."

A copy of the rate bill was also attached, and was headed, "Rate Roll for common school section number six, in the township of Ops, for the year, 1873." It then gave the names, number of the lots and concessions, and values; and the last column was headed, "Taxes," and one sum was placed opposite each name.

The first question for the Court is: Was the separate school in question legally established, and is it entitled, under the facts stated, and particularly in view of the fact that a Protestant teacher is employed in the public school, to continue as a separate school?

If the Court shall answer either branch of this question in the negative, the defendant is to have judgment with full costs of defence.

If the Court shall answer the first question wholly in the affirmative, the next question is: Was the plaintiff, under the facts above stated, exempt from the payment of all rates imposed in the year 1872 for the support of the public school? or, if liable for the rate imposed to pay for the new school-house, was he exempt from the payment of the other portions of such rates?

If the Court shall answer the second question wholly in the negative, the defendant is to have judgment with full costs of defence.

If the Court shall answer either branch of the second question in the affirmative, the plaintiff is to have judgment for the return of the goods in question, and \$10 damages for their detention, with his full costs of suit, unless the Court shall be of opinion that the defendant is protected by his said warrant, in which case the Court shall direct what judgment is to be entered.

In this term the case was set down for argument.

Patterson, Q. C., for the plaintiff. There are two questions. 1. Whether the separate school was legally established. 2. Whether the plaintiff is entitled to exemption. As to the first question, it appears that the necessary application was made to the township council, under Consol. Stat. U. C. ch. 65, sec. 1, and they passed a by-law establishing the separate school, and the moment the by-law was passed, the separate school was established. Sec. 3, which enacts that the school is to go into operation at the same time as in the case of altered school sections, which by Con. Stat. U. C., ch. 64, sec. 40, is the 25th December following, refers to the time of its coming into operation, and not that of its establishment. The object is to allow all necessary arrangements to be made, so that the school may go into operation when the 25th of December arrives. Sec. 6, also, which provides that no Protestant separate school

shall be allowed, except when the teacher of the common school is a Roman Catholic, refers to the time of establishment, namely, the passing^g of the by-law, and, therefore, the subsequent appointment of the Protestant teacher did not affect it. The next question is, as to the right of the plaintiff to exemption. The plaintiff, as a supporter of the separate school, was exempt from the payment of the common school rates. The return to the clerk was sufficient, as it furnished the common school trustees with the means of acquiring the knowledge of the persons exempt, and it is not necessary that a return should also be made to them. It clearly appeared, however, that they were informed of it. Section 14, which requires the persons exempted to be left off the roll, is peremptory, and therefore they should not have been included in the roll: *Harling v. Mayville*, 21 C. P. 499. As to the rate for the new school-house, although its erection was undertaken before the 25th December, yet as the separate school was established when the by-law passed, the plaintiff is exempt from this also.

Harrison, Q. C., contra. As to the establishment of the school, the only proper construction is, that the by-law giving the right to establish the school was not to take effect, under section 3, until the 25th December following. The intention was, to give the common school trustees an opportunity of doing away with the necessity of the separate school by appointing a Protestant teacher, and, therefore until that date there was no separate school established. Also, as the only object of the separate school is, in case the teacher of the common school is a Roman Catholic, as soon as the Protestant teacher was appointed the necessity for it was at an end. This clearly appears from section 6. Assuming, however, that a separate school was in existence, the next question is, as to the exemption of the plaintiff. The common school system is recognized by the legislature as the rule, and if a person wishes to avail himself of the exception, namely, the exemption as a separatist, he must shew everything necessary to take

himself out of the general rule: *Harling v. Mayville*, 21 C. P. 499; *Re Ridsdale and Brush*, 22 U. C. R. 122. The plaintiff should have shewn that a return was made by the local superintendent to the common school trustees. The township assessment and collector's roll, from which the common school trustees made up their roll, contained the names of all the ratepayers, without any distinction as to separate school supporters, and the trustees had no knowledge of their exemption, and they were under no obligation to find this out from the clerk. As far as they were concerned, the plaintiff was properly on the roll, and therefore no liability attaches to them. The plaintiff is liable, however, for the rate for the school-house, as it was undertaken before the 25th December. And the distress is legal as to this part: *Corbett v. Johnston*, 11 C. P. 317. At all events, as the defendant acted under the warrant of the trustees, he is protected.

HAGARTY, C. J.—One point suggested, rather than argued, for the defence is, that the defendant, as collector with a warrant apparently lawful, is protected. I find in the special case that the action is detinue, to recover possession of property seized, and the plaintiff claims a return, and asks judgment therefor; and if our opinion be adverse to the plaintiff, the defendant is to have judgment, with full costs of defence.

Although there are no formal pleadings, I think we must treat this as a case where the collector or bailiff avows for all, and defends the detention of the property, as a defendant in replevin who claims a return. In such case, the defendant becomes an actor, and must shew a title to the property. The point is fully discussed in *Harling v. Mayville*, 21 C. P. 499, in the judgment of my brother Gwynne.

It is argued that this separate school has no legal existence, so long as the school section teacher is a Protestant.

The words of Consol. Stat. U. C., ch. 65, sec. 6, are: "No Protestant separate school shall be allowed in any school

section, except when the teacher of the common school in such section is a Roman Catholic."

Here the by-law establishing the separate school was passed in January, 1872, the teacher then being a Roman Catholic.

Section 3 provides that the separate school "shall go into operation at the same time as is provided in the case of altered school sections."

By Section 40, of ch. 64, the alteration shall not take effect "before the 25th December, next after the alteration has been made."

We should look at the state of the section on the 25th December, 1872, when the by-law establishing this separate school took effect.

It seems clear that there could be no such school till the 25th December, 1872.

On the 16th November, 1872, the trustees of section No. six engaged a Protestant teacher, who, however, broke his engagement, and on the 24th December, the trustees engaged another Protestant teacher, his engagement taking effect on 7th January, 1873, when he commenced to teach, &c.

On 4th January, 1873, the separate school trustees were notified of the engagement of the Protestant teacher, by the common school inspector, and that consequently they could not share in the Legislative grant.

In January, (the day is not named,) the separate school trustees engaged a teacher, and on the 7th January their school was opened, and teaching commenced.

Therefore, on the same day, 7th January, probably at the end of the usual Christmas vacation, the ordinary school of the section was opened with a Protestant teacher, and so was the separate school.

This, of course, could hardly have been contemplated by the Legislature. The permission to have the separate school was a concession to the rights of conscience, and in that respect an innovation on the general scheme of our common school law.

As Burns, J., remarked, in *Re Ridsdale and Brush*, 22 U.

C. R. 124, "The Legislature intended the provisions creating the common school system, and for working and carrying that out, were to be the rule, and that all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separatists as availed themselves of the provisions in their favour." And my brother Gwynne, commenting on these words in *Harling v. Mayville*, says, at p. 511, that "it lies on the plaintiff, claiming exemption as a separatist, to aver and prove all those exceptional matters, taking him out of the general rule."

Now, if the plaintiff's argument be sound, the passing of the by-law establishing this separate school, on the ground that the teacher was then a Roman Catholic, although it could not come into effect until the 25th December following, at once gave him and the others a vested interest in the right to have a separate school, although the only legal foundation for that right was gone the day after the by-law was passed. If next day the Roman Catholic teacher died and a Protestant teacher were appointed, there could be no legal ground for having the school.

The well-known legal maxim, "*Cessante ratione, cessat et ipsa lex*," ought, it would seem, to govern in such a case, if it ever have any practical application.

On the 25th December when for the first time the by-law came into effect, the reason for it, and the only legal foundation for it, had, in fact, disappeared.

The provision that the by-law shall not take effect till a named day—in the present case nearly a year after its passing—may have been wisely intended to give time to all parties fully to reflect on their position. If the trustees of the section, thus threatened with disruption, yield to the force of the reasons alleged to actuate the intending separatists, the disunion, and the evil consequences thereof, may be averted by timely concession. Practical difficulties will probably often incur in working out any alteration of a general scheme based upon the religious belief of the teacher.

It seems to us preferable that the risk and inconvenience of the disruption should be thrown rather on those who choose to secede, than on those who are content to remain.

Sec. 8, of ch. 65, declares that the exemption of the separatists from the payment of school rates shall not extend to rates or taxes imposed to pay for school-houses the erection of which was undertaken or entered into before the establishment of such separate school.

This provision is very just, as the payment of rates to pay for a school-house may be extended over a period of ten years, (see sec. 35, ch. 64.)

I do not find any express power given to the separate Protestant school trustees to build school-houses, or impose rates therefor. Such a power and its exercise would be opposed to the idea of an existence depending on such a fluctuating matter as the religious belief of a school teacher.

Sec. 17, of ch. 65, gives them the same power "to impose, levy and collect school-rates or subscriptions, * * as the trustees of a common school have to impose, levy, and collect school-rates or subscriptions."

The trustees of a Roman Catholic separate school, under the sections of the Act of 1863, 26 Vic., ch. 5, sec. 7, in addition to these words, "shall have all the powers in respect of separate schools, that the trustees of common schools have and possess under the provisions of the Act relating to common schools." And section 18 expressly speaks of a rate "for the erection of a separate school-house."

In the case of Roman Catholics, their right to the separate school is not rested on the religious belief of the common school teacher.

But the difficulty remains, that the municipality have not repealed their by-law.

No doubt they could, with perfect propriety, have repealed it, as soon as the teacher ceased to be a Roman Catholic. But they have not done so, and we feel that, so long as the by-law stands establishing the separate school, we can hardly say that because the cause warranting the establishment has ceased, the school must cease with it.

We think it the better opinion that, whenever the teacher ceases to be a Roman Catholic, the municipality may repeal the by-law.

The inconvenience of making the school's existence to depend on anything except the repeal of the by-law—or the unwillingness of the separatists to remain any longer separated, are too obvious to require enumeration. One week the separate school might be lawful, the next week unlawful, varying with the teacher's belief.

By section 12, of ch. 65, the trustees of the separate school are to transmit to the local superintendent a correct return of all Protestant persons sending children to the separate school during the preceding six months.

This was done by the separate trustees, by copying all the names therein from the collector's roll of the township, and placing after each name the amount of taxes paid to the public school in 1872, and then informing the parties, and obtaining their consent thereto, as separate school tax; the plaintiff's name appearing in the said return.

This return was sent by them to the local superintendent, and that officer returned it to the clerk of the municipality, but omitted returning it to the trustees of the common school section, which he ought to have done, under section 13.

It is stated that at the August meeting of the municipality, (1873,) the latter body instructed the common school trustees to collect their own rates. It is stated that one of the councillors told the common school trustees that he had seen the June return of the separate school section; but nothing, we think, depends on that fact.

It then appears that the common school trustees levied, (by warrant, dated 27th September, 1873,) on the whole property in the section, ignoring any exemption as to the plaintiff and others claiming to be supporters of the separate school; acting, apparently, on the general assessment roll, where all the ratepayers were entered as of section No. 6, without any notice of the separate school section.

It also appears that the separate school ratepayers had objected to this way of assessing, but had not appealed against it.

Sec 14 directs the clerk not to include in the collector's roll, for general or other school rate, and the trustees not to include in their school rolls, any person whose name appears on the return.

Here the clerk had the return from the local superintendent, but nothing was done or marked on the rolls as to exemptions.

Had the clerk, in the present case, made out the collector's roll on which the trustees acted, he would, apparently, have been guilty of a breach of duty, in including the names that ought to have been exempted.

Sec. 15 directs him to allow any of the trustees or their collector to make a copy of the assessor's or collector's roll.

Here the trustees proceeded to collect the rates on their own authority. A copy of their warrant is given, and it directs the collection to be made "from the several individuals on the annexed rate bill." A copy of the rate bill has been furnished. It is headed: "Rate Roll for Common School Section Number Six, in the Township of Ops, for the year 1873." Then it gives the names, numbers of the lots and concessions, and values; and the last column is headed: "Taxes," and one sum is placed opposite each name.

But I suppose we are to gather from what is stated, that it was a transcript of the assessment or collector's roll.

Under the Assessment Act, sec. 32 Vic. ch. 36 sec. 21, there is a column in the roll to describe the school section.

Sec. 90 directs, that the collector's roll shall have a column for the school rate. This roll is to be prepared by the clerk.

Sub-sec. 11, sec. 27, of ch. 64, authorizes the trustees of each school section "to make out a list of the names of all persons rated by them for the school purposes of such section, and the amount payable by each, and to

annex to such list a warrant." And sub-section 12 "To apply to the township council, at or before its meeting in August, or to employ their own lawful authority, as they may judge expedient, for the levying and collecting by rate, according to the valuation of taxable property as expressed in the assessor's or collector's roll. * * And the township clerk, or other officer having possession of such roll, is hereby required to allow any one of the trustees, or their authorized collector, to make a copy of such roll, as far as it relates to their school section."

We are to assume here, as is stated, that on the assessment roll all the ratepayers were entered as of section No. 6, and it is then said, the trustees' collector distrained on the plaintiff, "under the said assessment."

It is stated that it was from the *collector's roll* the separate school trustees made out their return on the 23rd June. So that there was certainly a collector's roll in existence before and when the common school trustees made out their rate bill for their collector, as it was at the August meeting the council desired them to collect by their own authority.

Therefore, the township clerk could have entered the exemptions on the collector's roll.

Officially, the school trustees had no notice of the separate school return, as it was not sent to them, as directed by the statute.

We are not informed of the precise manner in which their rate bill was, in fact, prepared. Neither the assessment roll or the collector's roll, in the clerk's office, would give them any notice of exemptions.

We cannot, I think, assume that the trustees had any other legal guide for them, except the assessment and the collector's roll. The separate school return was there, but we cannot see how to connect the trustees with it, so as to make them trespassers for acting in the ordinary way on the general assessment of all the ratepayers in the section.

If, having duly sent to them the separate school return,

they then choose to prepare a rate bill of their own, ignoring such return, it may be that they would be liable.

But we cannot, on the case stated to us, see our way to holding them responsible.

It must be clearly understood that our judgment proceeds wholly on the manner in which we understand the facts to be, from the language, occasionally not very precise, used in the special case.

We feel some difficulty as to some of the expressions in the statute. For example, when it says, section 14, "The clerk shall not include in the collector's roll for the general or other school rate, and the trustees or board of trustees shall not include in their school rolls, any person whose name appears," &c. What is meant by "school rolls?" Does school roll there mean a roll prepared by them for their own collector, or is it merely their ordinary roll of those attending school, or sending children thereto?

It would seem, on the whole, that the trustees, when proceeding to collect by their own power, were supposed to prepare their roll, or rate bill, or whatever it is called, by copying from the assessor's or collector's roll.

In *Harling v. Mayville*, the trustees proceeded by their rate bill and warrant, and my brother Gwynne evidently assumes that the clerk would, on getting the separate school return, exclude the exempted names "from the collector's roll," and that then—though no return, (as here), was made to the trustees,—the latter, through the roll so corrected by the clerk, would have full notice, and must exclude the exempted names from the school rolls.

In the levy made on the plaintiff's property, there was, in any event, rightfully included the rate for the cost of the new school-house, payable within the year 1873.

We agree with the defendant's counsel, that this amount was chargeable on all the ratepayers, the building being contracted for and in progress of erection before the by-law came into effect.

This portion of the levy being correct would not make the whole rate valid.

The case states that the trustees levied a rate which included the expenses of the public school teacher's salary, and all other ordinary expenses of the school, and also so much of the costs of the new school-house as was payable within the year.

The case is distinguishable from *Corbett v. Johnston*, 11 C. P. 317, as here the levy seems, or at least is stated to be, for one sum or rate including several items. The warrant is to collect from the several persons named "the sum of money opposite their respective names."

We do not think that the fact of the separate school having received a share of the Legislative grant in 1873, can affect our decision.

We think there must be judgment for the defendant with costs.

GALT, J., concurred.

GWYNNE, J., was not present at the argument, and took no part in the judgment.

Judgment for defendant.

MCBRIEN V. SHANLY.

Contract for building railway—Sub-contract—Construction.

The defendant had a contract with the Midland Railway Company, for the construction of about fifty miles of their railway, and plaintiff was the assignee of a sub-contractor under the defendant for about four miles. By the plaintiff's contract all payments based on the certificates of the company's engineer were to be made monthly, and within ten days after defendant received the amount coming to him from the company; but defendant was to retain ten per cent. of such monthly estimates as a security for the plaintiff's due completion of the work to the satisfaction of defendant and of the company's engineer, which, with any balance coming to the plaintiff on a final estimate, was to be paid to him within thirty days after the work was accepted by the company and defendant paid therefor: and the suspension of the works by the company should not give defendant a claim for damages, but only for defendant's default in furnishing the estimates or paying them when paid by the company, or for any delay caused by the suspension, but he should be paid for the work actually done by him. The plaintiff's work was all completed and accepted by the company, and he claimed \$1510.26, \$719.61 for percentages retained by defendant up to the 31st December, 1872, which the jury found that defendant had received from the company, and \$790.75, for work done after that date, for which defendant had not been paid, but the jury found that the company had put an end to defendant's contract with them owing to his default.

Held, that the plaintiff was entitled to recover the whole amount claimed by him, for 1. As to the sum of \$719.61, as the defendant had received this from the company, and the fact that they had not paid defendant for the work on other sections could form no defence. 2. As to the sum of \$790.75. Per Hagarty, C. J., that the non-payment by the company being caused by the defendant's own default, he could not take advantage of it under the letter of the contract, as a defence to the action. Per Galt, J., that, in addition to the defendant being thus precluded, the plaintiff, by the express terms of the contract, was to be paid, in case of suspension by the company, for the work actually done by him.

ACTION, on the common counts.

Pleas: never indebted, payment, and set-off. Issue.

The cause was tried before Wilson, J., and a jury, at Toronto, at the Fall Assizes of 1873.

From the evidence, it appeared that the defendant had a contract with the Midland Railway Company for the construction of a portion of their railway, extending over about fifty miles; and the plaintiff, Jeremiah McBrien, was the assignee of one James McBrien, a sub-contractor under the defendant, for a section of about four miles.

The contract contained the following covenants on the part of the defendant:—

The defendant covenanted, "That he shall and will pay the prices hereinafter mentioned in the schedule attached, to the party of the first part.

"All payments to be made monthly to the party of first part, by cheque or draft on some one of the chartered banks of the Province, payable at Toronto or elsewhere, as agreed upon, and within ten days after the party of the second part shall have received the amount due to him for the said work from the said Midland Railway Company.

"All payments to be based upon the written estimate of the engineer of the Midland Railway Company afore-said, of the amount of work done by the party of the first part for the party of the second part, under this contract. But it is expressly understood and agreed that the quantity of work done, as shewn by such monthly estimates, shall be considered and taken as approximate only; and that on the completion of the work hereby contracted to be performed, the total amount of work, as ascertained by the measurements of the said engineer, shall be paid for irrespective of the quantity shewn by such monthly estimates.

"And it is hereby further expressly understood that the suspension of the works by the order of the Midland Railway Company, shall not entitle the party of the first part to make any claim for damages against the party of the second part; but such right shall arise only from default on the part of the party of the second part in furnishing the estimates or in payment of them, according to the true intent and meaning of this contract, when he shall have received payment of the same from the said Midland Railway Company.

"It is hereby agreed that it shall be lawful for the party of the second part to withhold and retain from the party of the first part ten per cent. from each monthly certificate; and the said percentage shall remain in the hands of the party of the second part, as security for the perfect and full completion of the said work, to the satis-

faction of the party of the second part, and to the acceptance of the engineer aforesaid ; and the amount so retained shall be paid to the party of the first part, together with any balance remaining unpaid, as shewn by the final estimate, within thirty days after the work shall have been delivered up and accepted as aforesaid, and the party of the second part being paid by the said Midland Railway Company.

“It is further agreed that if, at any time or times during the progress of the said works, it shall appear to the party of the second part that the force employed, or the rate of progress of the said works are not respectively such as to insure the completion of the said works within the time hereby limited, or, if the said party of the first part shall, from time to time, or at any time, pursue any course violating the provisions or evident import of this contract, the party of second part, on giving three days’ notice in writing to the party of the first part, or his agent in charge of the works, shall have the power, at his discretion, either to take the works, or any part thereof, out of the hands of the party of the first part, and re-let or otherwise carry on the same, with or without any further previous notice to the party of the first part, and the party of the first part shall be liable for the actual cost and expenditure which the party of the second part shall incur by so doing, and the party of the first part shall forfeit all right and claim to or any interest in this contract and to the amount of percentage retained and withheld by the party of the second part, on and from the monthly estimates, as hereinbefore provided for.

“It is further agreed that if the work hereby contracted to be performed shall be suspended by order of The Midland Railway Company, or by the said company neglecting to furnish plans, set out the works, not providing right of way, or any other cause of delay to the party of the second part, or by the said company refusing or neglecting to pay for the said work hereinbefore mentioned, the party of the first part shall not make any

claim for damages or loss sustained on account of or by reason of such suspension or delay in providing the party of the second part with the necessary powers to carry on the work; but all work done by the party of the first part shall be measured, and shall be paid for by the party of the second part at the prices hereinbefore mentioned, and any delay caused by the said company shall only entitle the party of the first part to an extension of time equal to that lost by such delay."

It was on the construction of the above covenants that this suit depended.

It was proved at the trial that all the work done by the sub-contractor, under whom the plaintiff claimed, was accepted by the railway company.

The following admission was put in: "It is admitted that the balance due on the contract for work done under it, after deducting payments, amounts to the sum of \$1,510.36. The contract was originally with James McBrien, and if the plaintiff is properly entitled as assignee, then that amount is due to him. The defendant, however, contends that, under the terms of the contract, the ten per cent. draw back on the whole work done is not yet payable; and he does not admit that the defendant has received his pay from the Midland Railway Company."

This sum of \$1,510.36 was divisible into two parts, one of \$719.61 for per-centages retained up to 31st December, 1872; the balance, \$790.75, being for work done and unpaid for after that date.

It was stated on behalf of the plaintiff by the treasurer of The Midland Railway Company, that the defendant had been paid in full for all work certified for by the engineer, including all percentages retained up to 31st December, 1872.

The company put an end to the contract, owing, as was found by the jury, to the default of the defendant.

The defendant in his evidence stated that, so far from the company having paid him in full, he was suing them for \$34,000, and for extras besides; and of the \$34,000,

there might be about \$20,000 retained for percentages. The residue was for work done, not paid for by the company.

It was not shewn that any money was paid by the company to the defendant for any work done after the 31st December, 1872, and it was for work done after that date that the plaintiff claimed the \$790.75.

The learned Judge left to the jury the question, whether the defendant had received the percentages up to 31st December, and they found that he had, and gave a verdict for the plaintiff for \$719. 61; but leave was reserved to the defendant to have the verdict entered in his favor if the Court should be of opinion that there was no evidence to sustain it.

It was also left to the jury to find, whether the company had put an end to the defendant's contract, and they found that the company had terminated it, owing to the default of the defendant.

On this finding, the learned Judge reserved leave to the plaintiff to move to increase his verdict to the sum of \$1,510. 36.

In Michaelmas Term, *Read*, Q. C., obtained a rule *nisi* to set aside the verdict for \$719. 61, and *McMichael*, Q. C., obtained a cross rule to increase his verdict.

In the same term *Read*, Q. C., shewed cause to the plaintiff's rule, and also supported his own rule. The plaintiff is not entitled to be paid until the whole of the work in the defendant's contract with the company is completed and accepted by them, and the defendant is paid the amount coming to him. The plaintiff is not entitled to the sum of \$719.61, as the evidence clearly shews that the defendant did not receive the amount of the percentages, up to the 31st December, 1872, and he is now suing the company for \$34,000, of which \$20,000 is for percentages withheld from him, including the percentage due on this section; and the \$15,000 he received from the company was simply an advance or loan, and was not in payment of any particular

work done. As to the balance claimed, \$790.75, by which the plaintiff seeks to increase his verdict, this certainly should not be allowed, as it is for work done after the 31st December, and there is no question that nothing has been paid since that date. The fact of the company having put an end to the contract for the defendant's default does not enable the plaintiff to bring an action, as by the terms of the contract the suspension of the work does not give a right of action, but it can only be brought for not furnishing estimates or in not paying them when paid by the company. The whole difficulty in the case arose from the plaintiff not having completed his work until November, whereas it should have been done by March.

McMichael, Q. C., contra. The plaintiff is entitled to recover for the whole amount claimed. According to the contract the plaintiff was to be paid as soon as the work—that is, the work specified in the contract between him and the defendant—should be completed and accepted by the company and the defendant paid therefor, and the evidence shews that the defendant has been paid in full for this work, and it is for other work, on other sections, that the plaintiff claims that the company are indebted to him. The plaintiff's work was fully completed before they put an end to the defendant's contract, and it was in consequence of the other sections that the trouble arose, and the defendant's contract was avoided. It was contended by the defendant that, according to his contract with the plaintiff, the plaintiff could have no claim against him until the whole of the work in his contract with the company was completed and accepted by them and he was paid therefor; but this is not the effect of the contract, for the contract shews that in case the work is suspended the plaintiff is to be paid for the work actually done by him; but even if it were not so, the defendant, by his own default in causing the contract to be rescinded, has precluded himself from setting up this defence.

HAGARTY, C. J.—The question arises wholly on the issue of never indebted, on the common counts. The defendant says that he does not owe the money in question, because he has not been paid it by the railway company.

No question arises on the pleadings.

It might perhaps be more correct that the defence set up should have come up by way of confession of the amount being due and the debt incurred by the defendant, but avoided by the term in the contract, that payment was not to be made till ten days after the defendant should have received the amount from the railway company. The defendant on this issue has to rest his defence on the broad ground that a complete cause of action has never accrued against him.

It is to be observed that the company's engineer is to ascertain and settle the quantity of the work to be done by the plaintiff for the defendant.

The defendant is allowed by the contract to retain ten per cent. of each monthly certificate, as a security for plaintiff's due performance of the work to the satisfaction of the defendant and of the company's engineer, and this amount, with any remaining balance on the final estimate, is to be paid to the plaintiff within thirty days after the work is accepted by the company, and the plaintiff shall paid by them.

The contract provides that if the company suspend the works, the plaintiff shall have no claim for damages against the defendant, but such right shall arise only from the defendant's default in furnishing estimates, or in payment of them, according to the true intent and meaning of the contract, when he shall have received payment from the company.

On the defendant's contention, he can retain ten per cent. of the plaintiff's whole claim till final acceptance and payment by the company. He admits in the contract that he is liable to an action for damages, if he do not pay the estimates according to the true meaning of the contract, when paid by the company.

He appears to be forced to contend that non-payment to him by the company, rightful or wrongful, is a full defence against the plaintiff's claim.

I have great difficulty in acceding to that view. I think the true intent and meaning of such a contract must be that at the best the defendant can say: "If I duly perform my contract with the company, and though I be entitled to the money from them, if from any cause, not arising from any act or default of mine, they do not pay, you cannot call on me to pay."

In the present case it is found that in consequence of the defendant's default the company have taken possession of the works, and determined his contract.

This contract was not produced by the defendant. If, as is most probable, it contained the common printed conditions in the contract before us, then in certain specified cases the company can take possession and relet the works to others, charging the defendant with any extra cost, and forfeiting all his claim to the ten per cent. retained.

I consider it was thrown upon the defendant to shew everything necessary to make a good defence, at least in the face of the finding, that he has made default.

I think in every bargain, like that between the plaintiff and the defendant, when payment for work actually done is to be postponed till payment by a third party, for whom, as the paymaster in chief, the whole work has to be done, there is a clear, implied condition lying at the root of the bargain, that nothing shall be done or omitted on the defendant's part to intercept or prevent payment by such third party.

If such non-payment be an absolute bar, there must be a remedy somewhere, and an action, we must presume, will lie by the plaintiff against the defendant for his wrongfully neglecting to perform his contract, so that the company had not paid or would not pay him, whereby the plaintiff could not get his pay.

This would be a cumbrous and circuitous remedy, and I

do not think the law is so unreasonable as to require it to be adopted.

I liken this case, in principle, to one of no uncommon occurrence.

A person about erecting a house contracts with a man to furnish the iron, or other work required. It is to be put in by a named day, with a sum named as liquidated damages of — per day, for each day after that day, with the right to deduct the penalties, if incurred, from the contract price. The owner is sued for the price, and pleads that the work was not done by the appointed time, and the contract price is swallowed up by the penalties. To this it is answered, that the iron work could not be done by the time agreed, because the owner had not his building ready to receive it. This is a good answer. The case of *Hamilton v. Moore*, 33 U. C. R. 100, 275, 520, may be referred to.

The plaintiff there is not driven to bring an action against the owner for not having the building ready, and thus preventing the plaintiff from fulfilling his contract, and avoiding the penalties.

It seems to me to apply equally here. By the defendant's default in dealing with others, he has not been paid by them, and therefore says he will not pay the plaintiff, pointing to the letter of the bargain. To this the plaintiff answers, that this all arises from the defendant's miscarriage, and his right to his payment must not depend on that. The defendant states that he is proceeding at law and in equity against the company for a large claim for extra work, and for ten per cent. held back by them.

I do not think that the plaintiff's right to payment is to depend on the possible success or failure of this litigation.

No attempt is made to disprove the finding that the contract with the company was terminated by the defendant's own default.

With this fact so found, I think the defence fails. The authorities are noticed in *Hamilton v. Moore*, before referred to. On the same point, see also *Westwood v. Secretary of State for India*, 7 L. T. N. S. 736.

Here, as a condition of the defendant paying the plaintiff, is the payment to the defendant by the company. Then the defendant, by his conduct, prevents, as it were, the performance of that condition.

In *Roberts v. Bury Commissioners*, in Error, L. R. 5 C. P. 310, Kelly, C. B., at page 326, says: "It is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition, the performance of which has been hindered by himself. * * And also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract."

On general principle, I think the defence fails.

GALT, J.—As to the rule obtained by Mr. Read, I think it should be discharged. It was proved that the defendant had been paid in full, including all sums previously retained for percentages, and although the defendant may dispute the correctness of the engineer's certificate as respects other parts of his contract, yet, as there does not appear to have been any question in relation to the work done by this sub-contractor, I do not think he can dispute payment of the percentages retained from him, the work having been completed and accepted by the company.

I have felt some difficulty in arriving at a decision as regards the second rule. The work, for which payment is sought to be recovered, was done after the 31st December, and, as claimed by the defendant, has not been paid by the company. This is a matter which may depend upon the fact, whether a sum of \$15,000, advanced by the company to the defendant, was to be applied on works to be done, or was to be treated as a payment on account of work already done; but, in the decision at which I have arrived, this difference is immaterial.

By the terms of the contract, as above set forth, it appears there are two provisions made for the suspension

of the works by order of the company. The first is, that the suspension of the works by order of the company shall not entitle the party of the first part to make any claim for damages against the party of the second part; but such right, (that is to say, a claim for damages,) shall arise only from default in the part of the party of the second part in furnishing the estimates, or in payment of them, when he shall have received payment of the same from the company.

It will be observed that this covenant has reference only to the right of the party of the first part to claim damages, and that this right is subject to certain contingencies, among which is the non-payment to the party of the first part for work done after the party of the second part has himself been paid; but this action is not brought to recover damages arising out of the suspension of the works, but is brought to recover payment for work actually done.

The second condition is, that under which this demand is made. By the terms of that condition, it was agreed that if the works should be suspended by order of the company, or if by their default the party of the first part should be delayed, he should have no claim for damages, by reason of such suspension or delay, but all work done by the party of the first part should be measured, and should be paid for by the party of the second part.

There is no stipulation here that the payment to the party of the first part should be contingent on the party of the second part having himself been previously paid by the company; but it is an absolute agreement that, in the event of the suspension of the works, the party of the first part should be paid for work done.

It may be said that these conditions are repugnant, but on examination it will be seen that such is not the case. The first provides only for a right to claim damages, which was to arise only if the party of the second part did not pay the party of the first part, after he had himself been paid; but the second is a positive agreement to pay for work done, and has no reference to the state of accounts

between the company and the party of the second part.

There can be little doubt that these provisions were made to meet the case of a suspension of the works from other causes than the default of the party of the second part, and, had such been the case, there could be no question as to the right of the plaintiff to be paid; but the jury have found that in this case the suspension was caused by the default of the defendant, and it would be contrary to all principle to allow the defendant to take advantage of a state of things arising from his own breach of contract.

I think, therefore, that by the terms of the contract itself the plaintiff is entitled to recover.

As regards the general principles of law, affecting cases of this description, I fully concur in the judgment of the Chief Justice.

GWYNNE, J., was not present at the argument, and took no part in the judgment.

Plaintiff's rule made absolute. Defendant's rule discharged.

WALLACE V. GILCHRIST.

Bond—Assignment of—35 Vic. ch. 12, O.—Construction of—Pleading—Landlord and tenant—Distress warrant—Illegal seizure—Contribution among wrong-doers.

Defendant was a creditor of one T. H., and at defendant's request one L., on receiving the bond the subject of this suit, executed a power of attorney to defendant to collect certain rent due by T. H. to L. Defendant then requested L. to sign a distress warrant against T. H., which L. did, and defendant placed it in plaintiff's hands with instructions to seize certain property which defendant had caused to be placed on the demised premises, as well as some other property elsewhere. The plaintiff seized, and shortly afterwards obtained a bond of indemnity from L. The property was claimed by J. H. a son of T. H., but was sold by defendant's instructions, who became the purchaser of a large portion. J. H. brought an action against L. and the plaintiff, and recovered against them. Plaintiff paid the damages and costs, and commenced an action against L. on his bond. This L. settled by conveying to plaintiff a lot of land and assigning to plaintiff by deed defendant's bond, and the plaintiff then sued defendant on this bond. The declaration set out the bond, and also the assignment to plaintiff, whereby L. duly assigned and made over to plaintiff the said bond and all his right and interest thereto or therein, and then alleged that all conditions were fulfilled, &c., to entitle the said L., until he assigned the said bond as aforesaid to plaintiff, and the plaintiff in pursuance of the statute in that behalf, and under the said assignment to him, to maintain this action.

Held, that 35 Vic. ch. 12, O., applies to assignments made and causes of action accrued before as well as after the passing of the Act; and that the declaration shewed a sufficient assignment.

Held, also, that the defendant was liable, for although the distress warrant was executed by L. yet it was done at defendant's request, who assumed the entire direction of the seizure and sale.

Held, also, that L. was damnified, in having to settle the plaintiff's action against him by conveying the land and assigning defendant's bond; and that he was not bound to defend the suit, for the plaintiff having acted under express instructions from defendant, L.'s agent, and having been guilty of no wilful neglect or default, L. had no defence.

Held, also, as the plaintiff's act in seizing and selling was done under defendant's direction, and in good faith, and was not apparently illegal in itself, the rule of no contribution among wrong-doers did not apply.

Held, also, that J. H. had a right of action against plaintiff and L., and it mattered not whether T. H. or J. H. was injured, so long as the plaintiff acted under the warrant, and was in consequence made responsible.

Held, also, that the plaintiff was entitled to recover the costs of defence incurred by him and L.

THE plaintiff sued as assignee of a bond given by the defendant to one Lawrence, under the following circumstances:—

The defendant was a creditor of one Thomas Huskinson, who was tenant to the said Lawrence. The defendant, for

some purpose of his own, applied to Lawrence to appoint him his attorney to collect an amount of rent due by Huskinson; this Lawrence agreed to do, upon receiving from the defendant the bond, which is the subject of this suit. After the bond had been given and the power of attorney executed, the defendant applied to Lawrence to sign a warrant of distress against Huskinson, which warrant was placed in the hands of the plaintiff for execution, and some days after a seizure had been made, a bond of indemnity was given to him, on his request, by Lawrence. The defendant had sent to a place in the township of Tosorontio, some miles distant from the farm occupied by Thomas Huskinson, and had two horses brought from thence and placed on Huskinson's farm; he then directed the plaintiff, the bailiff, to seize these horses under the distress warrant. He also directed him to seize some other property, which was not on the demised premises. The horses and other property were claimed by John Huskinson, a son of Thomas Huskinson, but they were sold by the plaintiff under instructions from the defendant, who, at the sale, became the purchaser of most of the articles sold. John Huskinson brought an action against Lawrence and the plaintiff, and recovered a verdict against them. The plaintiff paid the amount of the verdict and costs, and commenced an action against Lawrence on his bond, to recover the amount so paid. This demand was settled by Lawrence giving a lot of land to the plaintiff, and also assigning the defendant's bond to him.

The bond was set out in the declaration, and the condition was, "that if the defendant should well and truly get in and recover the said rent, or such part thereof as by due diligence he should be able to do, and should account to the said Lawrence for the same, and should at all times save harmless, indemnify, and keep indemnified the said Lawrence from all damages, costs, charges, expenses, and disbursements which the said Lawrence should or might be put to or incur by or through any illegal act committed by him, the defendant, in the exercise of the powers and

authority conferred on him by the said power of attorney, then the said obligation should be void."

The declaration also alleged that by an indenture of assignment, Lawrence "duly assigned and made over to the plaintiff the said bond of the defendant, and all the right, title, interest, property, claim, or demand of the said Lawrence of, in, to, or out of the same. And all conditions were fulfilled, and all things happened, and all times elapsed, to entitle the said Lawrence, until he assigned the said bond as aforesaid to the plaintiff, and the plaintiff, in pursuance of the statute in that behalf, and under the said assignment to him, to maintain this action."

At the trial before Galt, J., and a jury, at Barrie at the Fall Assizes of 1873, it was proved that the plaintiff had paid on account of the verdict and costs \$800; also for witness fees and counsel fee, \$109.75; and that there was still due as costs of defence a further sum of \$247.

At the close of the plaintiff's case, *W. Lount*, for the defendant, objected that, under the Act, 35 Vic. ch. 12, O., this bond was not assignable; also that the cause of action arose before that Act was passed; also that the warrant was from Lawrence himself; also that there was no proof of damnification of Lawrence, or evidence of any payment made by him, as set out in the declaration.

These objections were over-ruled, and leave was reserved.

The defendant was examined. He rested his defence principally on the ground that he had not signed the warrant. He also denied having either bought the horses, or interfered with or directed the sale.

This case went to the jury with a charge of which the following is a memorandum: "I shall tell the jury that, in my opinion, if the seizure and sale were directed by the defendant he is liable, whether he signed the warrant or not. I shall ask them. 1. Did Wallace receive the warrant from defendant, or in his presence? 2. Did defendant interfere to have the horses brought from the township of Toronto, and placed on the farm, in order that they might be seized? 3. Did defendant interfere

in the sale, not as a purchaser only, but in directing the proceedings? If they find these questions in the affirmative, I shall hold that the plaintiff is entitled to their verdict."

Lount renewed his objections, and objected to the charge, on the ground that the jury should have been told that the only amount the defendant could be made liable for was the original damages and costs.

The jury found a verdict for the plaintiff, for \$1000, the full amount of the bond.

In Michaelmas Term, *Harrison*, Q. C., obtained a rule *nisi* to enter a nonsuit on the leave reserved, on the objections taken at the trial; or for a new trial on the law and evidence, and for excessive damages; or to arrest the judgment—1. Because it does not appear that the bond was assigned since the passing of the Act, and the Act does not apply to proceedings had before its passing. 2. That it does not appear from the declaration that Lawrence assigned any right or cause of action so as to authorize the plaintiff to sue in his own name, or otherwise; but merely that he assigned the bond and all claim to it, without averring an assignment of any right of action previously accrued. 3. It appears the power of attorney from Lawrence to defendant authorized the defendant to collect and recover from one Thomas Huskinson certain rent, and the bond or obligation was to indemnify Lawrence against all damages, &c., which he should be put to through any illegal act of the defendant in the exercise of the powers and authorities conferred on him by the power of attorney; and the illegal act alleged in the declaration was the seizure of certain horses and pigs, the property of one John Huskinson, off the demised premises, and the selling of the property of John Huskinson for too little; and it is not shewn how Lawrence could be or was damnified by these acts, which were not authorized by the power of attorney, and the obligation only extends to acts illegal within the scope of the power. 4. The plaintiff was the person doing the

illegal acts, and the recovery in the declaration against him and Lawrence therefor; and the payment by the plaintiff, as alleged in the declaration, was not a forfeiture of the bond, and gives no cause of action; a payment by the plaintiff, being a joint wrong-doer with Lawrence, not being any damnification of Lawrence. 5. That John Huskinson could not in law have a right of action for selling his goods and property for too little, his claim being against the tenant Thomas Huskinson for allowing them to be seized and sold for rent at all, and Thomas Huskinson is the person who would have a cause of action for this alleged wrong.

In this term *McCarthy*, Q.C., shewed cause. The bond is assignable under 35 Vic. ch. 12 sec. 1, which provides that every debt or chose in action arising out of contract shall be assignable at law, and this is clearly a debt or chose in action arising out of contract. In *Wellington v. Chard*, 22 C. P. 518, where the statute was considered, the widest meaning was given to it. Under sec. 3 causes of action arising before as well as after the passing of the Act are included. The distress warrant was executed by Lawrence at the defendant's request, who directed its issue and the sale to be made under it; and the defendant is therefore liable. Lawrence was clearly damnified, as he had to settle the action brought against him by the plaintiff, by conveying the land and assigning the defendant's bond. As to the verdict being contrary to law and evidence, the evidence amply supports it, and the Court should not interfere. As to the measure of damages, the plaintiff is clearly entitled to his costs of defence: *mi th v. Compton*, 3 B. & Ad. 407. As to arrest of judgment. The Act applies to assignments made before as well as after the passing of the Act. The declaration shews a sufficient assignment, and the plaintiff is entitled to sue for causes of action accruing as well before as after the assignment. The defendant clearly acted illegally in bringing the horses on the premises, and then directing the bailiff to seize them, and also in directing the bailiff to seize the property off the pre-

mises: *Woodfall* L. & T., 10th ed., 395, 412-3. The rule tht there is no contribution among wrong-doers does not apply here, as the act was done under the direction of the defendant, and was not illegal in itself, and the plaintiff acted *bonâ fide*: *Betts v. Gibbins*, 2 A. & E. 57; *Toplis v. Grane*, 5 Bing. N. C. 636. There can be no question, but that John Huskinson had a right of action against the plaintiff and Lawrence: *Bail v. Mellor*, 19 L. J. N. S. Ex. 279. This has already been decided in the action brought by John Huskinson: *Huskinson v. Lawrence*, 25 U. C. R. 58, 26 U. C. R. 570.

Harrison, Q. C., contra. As to the motion for a nonsuit. The bond was not assignable under 35 Vic. ch. 12, O., as it was assigned before the passing of the Act. Also the cause of action having accrued at the time of the assignment, and therefore arisen before the passing of the Act, did not come within the terms of it. Sec. 1 refers to debts and choses in action arising after the passing of the Act, and speaks of debts and choses in action as two different things. Sec. 3 speaks alone of choses in action, and as the bond creates a debt, and not a chose in action, it did not fall within sec. 3. The defendant cannot be held liable for the acts of the bailiff, for the warrant was signed by Lawrence and not by him, as he refused to do so. There was clearly no damnification of Lawrence, for the mere fact of the plaintiff commencing an action is not sufficient; it should have been proved that damages were recovered against him. As to the measure of damages, it does not appear that there was any joint retainer, and therefore nothing to shew any liability on Lawrence's part to the costs of defence. [*McCarthy*, Q. C.—This was not raised at the trial, otherwise it would have been proved.] Moreover, the costs of defence are not covered by the bond. The first point taken in arrest of judgment has already been discussed. As to the other points. The plaintiff is suing for a cause of action which accrued to Lawrence, and he does not aver that he was the assignee of that chose in action. The bond given by the defendant to Lawrence was only to indemnify him against

illegal acts within the scope of the power, as, for instance, while distraining Thomas Huskinson's goods, but it cannot extend to acts not contemplated by the power, as was done here in seizing John Huskinson's goods and selling them for too little: *Irwin v. Corporation of Mariposa*, 22 C. P. 367. The plaintiff was a joint wrong-doer with the defendant, and therefore cannot recover, for there is no contribution between wrong-doers. Lawrence really never was damnified, as John Huskinson never had a right of action against him, but his right of action was against Thomas Huskinson, for allowing his goods to be seized and sold, and Thomas Huskinson was the person who would have had the right of action against them. Also the payment made was by Wallace and not by Lawrence, and it does not appear that the defendant was ever notified of the action against Lawrence and the plaintiff; if he had, he might have been able to have settled it for less.

GALT, J.—There can be no doubt from the finding of the jury, which is fully borne out by the evidence, that the plaintiff is entitled to recover, unless he is precluded by reason of the objections taken in point of law.

As respects the objections raised under the statute, I am clearly of opinion that they are not entitled to prevail, namely, the first and second as respects the motion for a nonsuit, and the first as respects the motion to arrest the judgment.

The first section of the Act makes "every debt and chose in action arising out of contract," &c., "assignable at law by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as may be contained in the original contract; and the assignee thereof shall sue thereon in his own name in such action, and for such relief as the original holder or assignor of such chose in action would be entitled to sue for."

The third section defines the word "assignee" to include "any person now being, or hereafter becoming entitled by any first or subsequent assignment, or any derivative or

other title, to a *chose in action*, and possessing at the time of action brought the beneficial interest therein, and the right to receive and to give an effectual discharge for the moneys, or the charge, lien, encumbrance, or other obligation thereby secured."

From this provision, it is quite clear that the Legislature intended to include, not only assignments made after the Act was passed, but also those which had been executed before.

As to the distress warrant having been executed by Lawrence himself, it was proved that this was done at the request of the defendant, who took upon himself the entire direction of the seizure and sale.

As to the objection that there was no proof of damnification of Lawrence, it was shewn that an action had been brought against him and the plaintiff, which had resulted in a verdict against them both; and it was also proved that the plaintiff had commenced an action against him, to recover the amount paid by him in satisfaction of the judgment recovered against them both. This action was settled by Lawrence giving a conveyance of some lands, and making an assignment of this bond.

I can see no reason why Lawrence should have been compelled in the first instance to submit to an action, where he would have had no defence. The bond given was to indemnify Wallace against all loss, costs, charges, damages, and expenses which the said Wallace might at any time thereafter bear, sustain, be at, or be put to, for, or by reason, or on account of any act, deed, matter, or thing by him done in the execution of the said distress warrant, so as the same should not be caused by his wilful neglect and default. The plaintiff in all that he did acted under the express instructions of the defendant, who was Lawrence's agent, and there was no evidence that he had been guilty of any wilful neglect or default.

As respects the second ground taken by the rule in arrest of judgment, Lawrence assigned the bond in as full and ample a manner as it was possible for him to do;

and the first section of the Act, above referred to, expressly entitles such an assignee to sue thereon in his own name, for such relief as the original holder would have been entitled to. There is no distinction drawn between causes of action that had actually accrued and those which might thereafter accrue.

As to the third objection, it was proved that the defendant had acted illegally in, at least, two respects; he had sent to a distance and brought away horses which did not belong to the tenant, and then directed the bailiff to seize them. He also directed the bailiff to seize property which was not on the demised premises; and for these acts Lawrence was held responsible in the suit which gave rise to the present litigation.

The fourth objection, namely, that the plaintiff was a wrong-doer together with Lawrence, and could not therefore have recovered from him, and that therefore there was no forfeiture of the bond, remains to be considered.

Mr. Harrison cited no authority, but relied on the well-understood principle of law that there is no contribution among wrong-doers; but, as is stated in the case of *Betts v. Gibbins*, 2 A. & E. 57, this rule does not apply when the act is not clearly in itself illegal.

The case of *Adamson v. Jarvis*, 4 Bing. 66, cited in the foregoing, is also in favour of plaintiff. In that case the defendant had employed the plaintiff to act as auctioneer of certain articles which he represented as belonging to him; and which were sold by the plaintiff, who accounted to the defendant for the proceeds. Subsequently the true owner sued the plaintiff for this conversion, and recovered a verdict against him, and the action was brought on an implied contract of indemnity. In giving judgment, Best, C.J., says, at page 73, "The rule that wrong-doers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

Now, in the case before us, the plaintiff acted throughout under the express instructions from defendant, who had full

authority to proceed in collecting the rent asserted to be due; and, consequently, Lawrence was responsible to the plaintiff for anything that he did, provided it was not shewn that he knew what he did was illegal. The cases above mentioned were on the implied indemnity which the law raises in cases of that description. In this case the plaintiff held an express bond of indemnity, but it may be said that such a circumstance cannot affect this defendant, and that he can only be liable to the same extent as he would have been had Wallace's claim against Lawrence been founded on the implied liability, as it is not alleged that he was a party to the bond. But without any such bond, the cases seem to establish that, under circumstances similar to the present, the landlord would be bound to indemnify the bailiff. As already stated, the plaintiff acted under the express directions of the landlord's attorney, and it is laid down in *Betts v. Gibbins*, as quoted and approved in *Toplis v. Grane*, 5 Bing. N. C. 636, at page 650, "Where an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the rights of a third person, yet if such act is not apparently illegal in itself, but is done honestly and *bonâ fide*, in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof."

The case of *Toplis v. Grane* was in many respects similar to the present, the illegality complained of being the seizure and sale of property belonging, not to the tenant, but to other persons, whose property was not liable to be distrained on, as in the present case seizing property not on the demised premises, or which had been improperly brought to and placed on the premises by the defendant or by his instructions, in order that it might be seized, as is suggested, under a mistaken idea of a right so to do.

If the defendant's contention be correct, that under no circumstances can a person who has done an unlawful act, however innocently, claim an indemnity from his employer, an indemnity could never be lawfully given to a sheriff

seizing goods fairly supposed to belong to an execution debtor but really the property of a third person. "Generally speaking," it is said in *Woodfall*, L. & T. 10th ed., 413, "a warrant of distress creates an express or implied indemnity to the bailiff and his assistants against actions, (in any form), which are maintainable on the ground that the landlord had no right to distrain;" for which doctrine he cites *Toplis v. Grane*. The distress warrant often contains the words that the warrant itself shall be the bailiff's sufficient warrant and indemnity, as in *Ibbett v. De La Salle*, 6 H. & N. 233.

Even if the express indemnity given by Lawrence to Wallace, about a week after the warrant, may not expressly affect defendant, still where the promise to indemnify the bailiff is to be gathered from all the facts, we think it may be referred to with the other facts, to shew that Lawrence intended to indemnify the plaintiff. See the language of Tindal, C. J., in *Toplis v Grane*.

Then, as to the last objection. This objection appears to have been already before the Court in the case of *Huskinson v. Lawrence*, 25 U. C. R. 58, and same case 26 U. C. R. 567, where the Court says, "An action will lie by a party, other than the tenant to the landlord of the premises upon which a distress for rent is made, for an excessive distress. The present is an action by such a party alleging the wrongful seizure of his goods. But we apprehend he stands in no other or better position than the tenant would do if he were claiming for a similar injury."

In the present case the goods were sold under the distress warrant, by direction of defendant, who was the principal purchaser at the sale, and it is of no consequence whether the injury done was inflicted on John or Thomas Huskinson, so long as the plaintiff was acting under the warrant, and in consequence of so acting was made responsible.

The question as to excessive damages remains to be considered. The plaintiff stated at the trial that he had paid two sums, one of \$800 and another of \$119. And

another witness, who had acted as attorney for the plaintiff in the Huskinsons' suits, stated that the costs of the defence were still unpaid, and amounted to \$247. His evidence on this point was given as follows: "I was acting in drawing the papers between defendant and Lawrence. There was a power of attorney from Lawrence to defendant dated the same day as the bond and recited in the bond. Wallace owes me as costs of defence \$247. My bill was not taxed."

Mr. Lount, for the defendant, at the close of the case, objected that the jury should have been told that the only amount the defendant could be made liable for was the original damages and costs. These were on the argument before us stated to be: verdict, \$190; costs, \$374; writs, \$12.85. These amounts were not specified at the trial, because the plaintiff claimed that he had paid more than the amount of the bond, including the \$247.

The point now to be considered is whether, under the circumstances of this case, the plaintiff can demand payment of the costs of defence incurred by him and Lawrence, namely, the \$119 and \$247.

On the argument of the rule, the learned counsel for the defendant insisted that as the evidence did not expressly connect the sum of \$247 with Lawrence this amount should not be allowed. In answer to which it was said that no such objection was taken at the trial; that had such a point been made, it could have been cleared up at once by simply asking the attorney for whom he was acting when these costs of defence were incurred; that the objection was pointed to all the costs of defence, and not as to whether they were costs incurred by Lawrence and Wallace jointly, or by Wallace alone.

It is impossible to read the evidence without being satisfied that this contention is correct, and as no doubt on this head was raised at the trial, we think it ought not to be raised now.

The case of *Smith v. Compton et al.*, 3 B. & Ad. 407, shews that where a party is entitled to an indemnity, he

is entitled to the costs incurred by him in defending a suit.

Tenterden, C. J., says, "As to the costs, the plaintiff here had a right to claim an indemnity, and he is not indemnified unless he receives the amount of the costs paid by him to his attorney."

Also in *Howard v. Lovegrove*, L. R. 6 Ex. 43, which was an action brought on a bond to indemnify, and where the question was, not only whether the plaintiff was entitled to recover his taxed costs, but also the costs as between attorney and client, the Court were unanimously of opinion that the plaintiff was entitled to recover all the costs.

By the bond in this case, as set out in the declaration, the defendant agreed to indemnify Lawrence against all damages, costs, charges, expenses, and disbursements which he might be put to or incur by or through any illegal act committed by him, the defendant; and, as we are of opinion that Lawrence did become liable for these acts to the plaintiff, we think that this objection also fails, and that this rule should be discharged.

HAGARTY, C. J., concurred.

GWYNNE, J., was not present at the argument, and took no part in the judgment.

Rule discharged.

MEMORANDA.

During this term the following gentlemen were called to the Bar:—

ROBERT HAMILTON DENNISTOUN, JOHN HENRY METCALFE, JOHN HOWATT BELL, EDWARD HARRY DOUGLAS HALL, WILLIAM DRUMMOND HOGG, CHARLES EDGAR BARBER, KENNETH MCLEAN, EDWARD MEEK, WILLIAM McDONNELL, BURRITT EDWARDS, ALBERT ELSWOOD RICHARDS, HENRY ARTHUR REESOR.

On the 17th day of June, 1874, THE HONORABLE SAMUEL HENRY STRONG, one of the Vice Chancellors of the Court of Chancery, GEORGE WILLIAM BURTON, ESQUIRE, one of Her Majesty's Counsel, and CHRISTOPHER SALMON PATTERSON, ESQUIRE, also one of Her Majesty's Counsel, were sworn in as Judges of the Court of Appeal constituted under "The Administration of Justice Act, 1874," 37 Vic., ch. 7.

EASTER TERM, 37 VICTORIA, 1874.

(*From May 18th to June 6th.*)

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

CHADD V. MEAGHER.

New trial—Application for on affidavits—Charge of perjury.

The plaintiff having recovered a verdict for \$200, for malicious prosecution, a new trial was moved for on affidavits, shewing that the plaintiff and a person called by him, and whose evidence was material, had committed perjury in swearing that this witness was a married sister supported by him, while in fact she lived with him as his wife, and was known as such. The affidavits, however, did not shew that these facts were not known at the trial, and the evidence fully proved the plaintiff's case. The Court refused to interfere.

The practice of indicting parties or witnesses for alleged perjury in a civil suit, while proceedings are still pending, disapproved of.

DECLARATION : for malicious prosecution.

Plea : not guilty. Issue.

The cause was tried before Wilson, J., and a jury, at Toronto, at the Winter Assizes of 1874.

The case for the plaintiff was that the defendant charged him before a Justice of the Peace with stealing his horse. He was arrested on a warrant, brought before the Justice of the Peace, and discharged. He alleged that there was no pretence for charging a larceny, as there was a dispute about the ownership of the horse.

was clearly shewn that the plaintiff was to make a waggon for the defendant, for which the defendant was to give him the horse in question. The plaintiff before, or while the waggon was being made, had been allowed to

use the horse several times. The defendant said, that before the plaintiff had completed or delivered the waggon to him, he had refused to give him up the horse, which the plaintiff had then temporarily in his possession.

The plaintiff was examined, and spoke of a subsequent witness, Harriet Carey, as his sister and housekeeper ; her husband being well-known to him, and being elsewhere, and not on good terms with his wife.

Harriet Carey stated that she was the plaintiff's sister, and lived with him, and told all about her husband, &c.

Her evidence was material.

There was a good deal of testimony on both sides. The jury found for the plaintiff, with \$200 damages.

In Hilary Term, *M. C. Cameron*, Q. C., obtained a rule *nisi* for a new trial, on the law and evidence, and for excessive damages ; and on two affidavits, to the effect that the witness, Harriet Carey, had gone by the name of Mrs. Chadd, and lived with the plaintiff as his wife.

In the same term *Harrison*, Q. C., shewed cause. The affidavits really do not amount to anything, as they simply state that Harriet Carey, one of the plaintiff's witnesses, lived with the plaintiff as his wife, and was not his sister, as she and the plaintiff swore at the trial ; but this had nothing to do with the verdict, and even had the persons making the affidavits been called as witnesses at the trial their evidence could not have been received. A new trial will not be granted on the ground of witnesses having committed perjury : *Davies v. Brecknell*, L. R., 3 P. & D. 88. But even throwing aside their evidence altogether, the verdict is amply sustained by the other evidence, and, in fact, the defendant's own evidence proved the plaintiff's case. It clearly appeared that there was no ground at all for the charge of larceny. This, therefore, is in effect an application for a new trial for excessive damages, and Courts will not interfere on this ground : *Campbell v. M'Donell*, 27 U. C. R., 343 : *Appleton v. Lepper*, 20 C. P. 138. The verdict was only \$200, which certainly cannot be called excessive.

M. C. Cameron, Q. C., contra. The affidavits clearly shew that the plaintiff and the witness, Harriet Carey, had committed perjury, in swearing that she was the plaintiff's sister, while in fact she was living with him as his wife, and the defendant has proceeded against the plaintiff for perjury, but a bill has not yet been found. There is no question but that the jury were influenced in giving their verdict, out of sympathy for the plaintiff as supporting his sister. Her evidence, also, was very important, as she swore that the horse was to be the plaintiff's from the time the bargain was made, and not from the delivery of the waggon, as the defendant swore. Had the jury been aware of the true relation she bore to the plaintiff her evidence would not have been believed, and a very different verdict would have been given. The plaintiff was, in fact, guilty of larceny, or, at all events, it would come within the meaning of the statute, as a fraudulent taking: *Regina v. Reeves*, 5 Jur. N. S. 716. There really was no damage done to the plaintiff, as he never went to jail, but simply went before the magistrate, and after a short trial was discharged. Although in ordinary cases the Court will not enter into the question of damages, yet under the circumstances of this case they should do so.

HAGARTY, C. J., delivered the judgment of the Court.

Mr. Harrison, in shewing cause, relied on the verdict being amply supported on the other evidence adduced, even if it were open to the defendant to impeach the plaintiff's and the woman's credibility. He filed no affidavit in answer.

It was stated on the argument that the defendant had proceeded against the plaintiff for perjury on this point. We are not certain if the bill had been found, but think it had not yet been before a grand jury.

I have looked into several authorities. In *Thurtell v. Beaumont*, 1 Bing. 339, Park, J., says, at p. 34, "I have looked into the books: I find many applications for new trials, on the ground of bills found by the grand jury, but none in which the application has succeeded. In one case,

where the ground of the motion was, that a bill for perjury had been found against the principal witnesses, Lord Mansfield said that the granting a rule for such a reason would have a most dangerous tendency, as it would open a door for constant scenes of perjury, and tempt a party to delay execution by indicting his adversary's witnesses."

In *Warwick v. Bruce*, 4 M. & S. 140, Lord Ellenborough expresses himself strongly to the same effect.

In the case cited by Mr. Harrison, *Davies v. Brecknell*, L. R. 3 P. & D. 88, the plaintiff had been convicted of perjury for the evidence he had given, but Sir J. Hannen declined granting a new trial.

The point before us is different. The new matter relied on goes merely to shew that the plaintiff and his alleged sister lived together as man and wife. There is no proof or affidavit on the defendant's part that these facts were not known at the trial, or that they have been discovered since. The two affidavits merely state the facts, without reference to the time of their coming to light.

We do not feel called on to lay down any inflexible rule as to the granting or refusing of a new trial, on the discovery of such matters as appear here. We must exercise our discretion on each case as it arises.

In the present case, we find the case against the defendant to be fully proved, without any reference to the evidence either of the plaintiff or the woman.

The facts were plain enough. The magistrate and the constable narrated the account the defendant gave of the matter, and what was stated when they were brought face to face, when, as the magistrate stated, the parties differed little in the main features of the case.

The defendant's own evidence, we think, went far to establish the case. Also, the fact of the horse being always called the plaintiff's horse, and treated as such, and Whitaker's and others' evidence.

The defendant cannot complain of the manner in which the learned Judge left the case to the jury, and it is impossible for us to set aside the verdict for \$200 as excessive, though

a smaller amount perhaps would have been a more judicious finding.

If we interfered it could only be, (as in *Thurtell v. Beaumont*), on payment of costs.

We think the rule must be discharged.

We find in the cases a strong disapproval expressed of the practice of indicting parties or witnesses for alleged perjury in a civil suit, while proceedings are still pending.

We regret to find that it has been resorted to in the case before us.

Rule discharged.

THE QUEEN V. MASON.

Sending threatening letters—32-33 Vic., ch. 21, sec. 43—Construction of.

The 32-33 Vic. ch. 21, sec. 43, D., makes it a felony to send "any letter demanding of any person with menaces, and without any reasonable or probable cause," any money, &c.

Held, that the words, "without reasonable or probable cause," apply to the money demanded, and not to the accusation threatened to be made.

THIS was a case reserved by Hagarty, C. J., at the last April sittings of the Court of Oyer and Terminer, held at Toronto.

The first count of the indictment charged the prisoner with feloniously sending to one J. M. "a certain letter demanding money from the said J. M., with menaces, and without reasonable or probable cause * * then well knowing the contents of the said letter," &c., and setting out the letter which requested the prosecutrix to call and see him that night, and stated that "by doing so you will save money, as it, will cost a great deal more to defend yourself in Court next week than it does to make a friend of your humble servant."

The second count was the same as the first, except that it set out a different letter, which stated: "I will make it

cost you more to defend yourself than it does to make a friend of me," &c.

The evidence shewed that the prosecutrix J. M. kept a house of ill-fame, and that the letters were written in order to induce her to pay the prisoner money, to avoid his laying a complaint against her.

The prisoner was found guilty, but judgment was stayed, until the decision of this Court should be obtained as to whether the conviction could be sustained on this evidence.

McKenzie, Q. C., for the crown. The whole question is, whether the words reasonable or probable cause, used in the Act 32-33 Vic., ch. 21, sec. 43, D., refer to the charge or the money demanded. It is, however, laid down that the words apply to the making of the demand of the money, and not to the making of the accusation, and that the truth of the charge is immaterial, if the money be demanded without reasonable or probable cause : *Regina v. Miard*, 1 Cox C. C. 22 ; *Regina v. Carruthers*, 1 Cox C. C. 138 ; *Regina v. Hamilton*, 1 C. & K. 212 ; *Rex v. Tucker*, 1 Moo. C. C. 134 ; *Rex v. Tyler*, 1 Moo. C. C. 428 ; *Regina v. Chalmers*, 10 Cox C. C. 450 ; *Rex v. Robinson*, 2 Leach C. C. 749.

No one appeared for the prisoner.

GALT, J., delivered the judgment of the Court.

The case of *Regina v. Hamilton*, 1 C. & K. 212, was an indictment under 7-8 Geo. IV., ch 29, sec. 8, for feloniously sending to one J. A. a certain letter demanding money from her, with menaces against the Statute, &c. The words of this statute are, that "if any person shall knowingly send or deliver any letter or writing demanding of any person, with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security," and the prisoner was convicted. Rolfe, B., in summing up, told the jury that in his opinion "the words reasonable and probable cause," as used in the Act, clearly applied to the money demanded, and not to the accusation constituting the threat. This interpretation was also adopted

by Tindal, C. J., in the case of *Regina v. Miard*, 1 Cox C. C. 22, and may therefore be taken as settled.

The Statute under which the prisoner is indicted is 32-33 Vic., ch. 21, sec. 43, D., which enacts that "whosoever delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, or valuable security, or any other valuable thing, is guilty of felony."

The words of the two Statutes are nearly identical, and the sense is the same. In our opinion, therefore, the same construction must be placed upon them.

It is impossible to read the letters, which are the subject of this prosecution, without seeing that the prisoner does not even pretend to have any claim for money against the person to whom they are addressed; but writes them for the express purpose of inducing her to pay him an amount, in order to avoid having to pay a larger amount in defending herself against a charge which he threatens to prefer against her.

In our opinion the conviction should be affirmed.

Conviction affirmed.

GILBERT V. DOYLE.

Overholding tenants—31 Vic. ch. 26, O.

Held, Hagarty, C. J., dissenting, that on the evidence set out below, the County Court Judge was justified in determining that the tenant was an overholding tenant, within the meaning of the Act, 31 Vic. ch. 26, O., and wrongfully held over without any right or colour of right.

Per Hagarty, C. J. The intention of the Act was not to empower the County Judge to determine the question of right between landlord and tenant on its merits; but on its appearing that the tenant is holding under a *bonâ fide* belief of right, which the evidence in this case shewed, he should dismiss the case, and leave the right to be tried in ejectment.

In Hilary Term, *Diamond* obtained, under the sixth section of 31 Vic. ch. 26, O., an order for the removal of all

proceedings and evidence, taken before the Judge of the County Court of the County of Hastings, in an overholding tenant case under the above Act.

In the same term, upon the return of these proceedings and evidence, certified under the hand of the Judge, he obtained a rule *nisi* calling upon the above landlord to shew cause why the order made by the Judge of the said County Court in the above matter should not be rescinded, and why the proceedings had and taken in the said Court, in said matter, should not be set aside; and why a writ of restitution should not be issued to restore Luke Doyle, the tenant, to the possession of the premises in question, and from which he had been ejected under the writ issued upon said Judge's order, upon the grounds: 1. That the said Judge exceeded his jurisdiction in making said order. 2. That the said tenant was not an overholding tenant within the meaning of 31 Vic. ch. 26, of the Legislature of Ontario. 3. That the said tenant did not wrongfully hold possession of the premises without colour of right. 4. That the term or period of the demise had not yet expired, and if it had expired, the tenant was entitled to a notice to quit, which was not given. 5. That the Judge had no jurisdiction to make the order.

The order directed a writ to issue to the sheriff, commanding him forthwith to place the landlord in possession of the premises in question.

The point of contention upon the part of the tenant was that, although it was true that the tenant had originally entered under a written lease for a term which had expired on the 8th March, 1873, yet that the result of certain conversations and conduct of the parties, landlord and tenant, was to constitute Doyle a tenant for a further term, either for a year or otherwise, which had not expired, or at least constituted an agreement for a further lease. And, second, that at any rate, whether the legitimate conclusion to draw from these conversations and conduct was or not to entitle Doyle to retain possession as tenant for a term not yet expired, or otherwise, yet that

the circumstances and conduct were such as to give to Doyle a "colour of right" to remain, which ousted the jurisdiction of the Judge.

The affidavit upon which the intervention of the Judge was invoked, under the statute, was annexed to the lease under which the tenant entered, the term granted by which expired on the 1st of March, 1873. The affidavit alleged that, after the expiration of the lease, the landlord being desirous of making extensive repairs upon the premises, did not proceed to take possession, and allowed the tenant to remain in possession unmolested: that in April, 1873, the landlord proceeded to make the repairs, when the tenant asked the landlord what he was going to charge him for stopping, to which the landlord replied that he did not know: that the repairs were commenced in the month of May: that in the month of August, while the repairs were still progressing, the tenant again asked the landlord what he was going to charge him, as he presumed he would have the premises completed about the first of September: that the tenant said to the landlord, "You mark," by which the deponent understood him to mean, you make your estimate, and that he, the tenant, would mark, and that they would then see how near they would come together: that after a short time, the tenant said to the landlord, that in making the calculation he reckoned that he occupied about two months and a half before he, the landlord, commenced repairing, and about three and a half months since that time to the first of September, and that he thought it would be right to allow the rent for the two months and a half to be at the same rate as the rent paid under the old lease, and for the three months and a half at about half that amount; to which the landlord replied that he calculated at the rate of \$20 for the first two months and a half, and at the rate of \$10 per month for the last three months and a half; and that upon this latter basis they settled in full of all claims up to the first of September then next.

The affidavit further alleged that it was distinctly understood between the tenant and the landlord, that if the

tenant desired to remain as tenant after the said first of September, a new bargain would have to be made, and new terms agreed upon: that shortly thereafter the landlord entered into negotiations for the sale of the premises to certain persons, which negotiations fell through: that on the 6th of September, in a conversation between the tenant and the landlord, the former offered \$400 per annum for a further term of five years, but the landlord replied that he would require \$450 per annum, and not even then would he rent the premises at that sum except subject to a stipulation that the tenant should give up possession upon a notice of three months given at any time, in case the landlord should have an opportunity of selling the premises; that the tenant replied that such terms would not suit him at all, and the landlord then said, in effect, that he would rather lock up the premises than let them, unless subject to this stipulation: that shortly afterwards, and while the landlord was in treaty for a sale of the premises, the tenant came to him and said that he thought \$400 was enough rent for the premises, and that he should not be bound to give up possession at three months' notice: that thereupon the landlord sold to Gilbert, who then being seized of the premises and the reversion, claimed to be entitled to remove the tenant as an overholding tenant under the Act.

He also filed an affidavit shewing service of the usual demand in writing upon the tenant to surrender the possession, and his refusal, stating as his reason that his landlord had agreed to renew the lease, and had kept him in suspense until the house was completed, and had then sold the premises from under him. The deponent testified his belief that this excuse was wholly without foundation, stating his reason for such belief to be, that prior to his purchase, Jones, the landlord, assured him that, although he and the tenant had spoken of the tenant taking another lease, yet they could not agree upon the terms.

The landlord also swore that the retention of the possession by the tenant was wholly wrongful, and that

the only reason that the tenant assigned to him for not going out was, that he would not go out of possession until the law put him out.

The defendant swore that after the written lease expired, a tenancy from year to year was created between the parties, and that the amount paid by him was paid as rent for two quarters and was accepted as such by the landlord; at all events that he *bonâ fide* believed that he was such tenant.

Other evidence was also produced on behalf of the tenant

In this term, *Crickmore* shewed cause. The whole question is, whether the tenant wrongfully held over without colour of right. The evidence shews that the defendant's lease had expired on the 1st of March, and that there was no new lease, but that the defendant was to occupy the premises until the improvements were made; and it was for this that the amount was paid to the landlord. During the time the defendant was in occupation, some negotiations took place relative to a new lease, but the evidence clearly shews that the only lease that the landlord would grant was at a rent of \$450, determinable at any time, on giving three months notice. This the tenant refused to accept, and no written lease was granted, and the landlord subsequently sold to the plaintiff. It is clearly laid down that even permitting a tenant, whose term has expired, to remain in possession pending a treaty for a further lease, does not create a tenancy from year to year; but he is strictly a tenant at will, and may be turned out of possession without notice: *Doe dem. Hollingsworth v. Stennett*, 2 Esp. 717. It is contended by the defendant that the amount paid by him created a tenancy from year to year; but although a tenancy from year to year may be implied from the receipt of rent, yet it is open to the party receiving it to shew the circumstances under which it was received: *Doe dem. Lord v. Crago*, 6 C. B. 90. Also the rent must be paid in reference to a year, or some aliquot portion of a

year: *Roaf v. Garden*, 23 C. P. 59. In *In re Woodbury and Marshall*, 19 U. C. R. 597, which was a case under Consol. Stat. U. C. ch. 27, sec. 63, where the facts were somewhat similar to the present, it was held that it came within the Act, and that the Commissioner was justified in holding that the defendant was an overholding tenant within the meaning of the Act, and held over without colour of right. In the present case the tenant was clearly an overholding tenant within the Act, and held over without colour of right, and therefore the order of the County Judge should not be rescinded.

Diamond, contra. There was clearly a new tenancy created between the parties after the written lease expired. The amount paid by the defendant was paid as rent, and was accepted as such, and was paid in reference to an aliquot portion of the year, namely, for two quarters. This would clearly constitute a tenancy from year to year. At all events, the defendant *bonâ fide* believed that he was a tenant from year to year, and therefore it cannot be said that he was overholding without colour of right. There was clearly a *bonâ fide* contention of right, even although it might not be a valid contention, and therefore it is a question which should properly be submitted to a jury for their decision. The moment it appeared that the tenant was holding under a *bonâ fide* belief of right, the jurisdiction of the judge was ousted, as he has no power to determine the case on the merits. In *Adams v. Bains*, 4 U. C. R. 157, it was held that a tenant remaining in possession after the expiration of his term, and paying two months rent, cannot, in the middle of the third month, be treated by his landlord as an overholding tenant under 4 Wm. IV., ch. 1. And it was questioned whether the Act applied in any case but the plain one of the tenant overholding after the expiration of a term expressly created by contract between the parties. See also *Re Reeve*, 4 P. R. 27. In the present case the defendant was not overholding after the 1st March, as he was in by consent of the landlord. It was contended that the

defendant was at most only a tenant at will; but, if a tenant at will, it has been expressly laid down that the statute only applies to tenants overholding after the term has expired, and not to a tenancy at will: *Clement v. Schriver*, 5 O. S. 310. The cases of magistrates, whose jurisdiction is ousted where there is a *bond fide* assertion of a claim, or colour of right, would shew that the defendant had such a colour of right here: *Regina v. Snape*, 11 W. R. 434; *Paley v. Birch*, 16 L. T. N. S. 410; *Paley on Convictions*, 5th ed., 137-8. See also *Roaf v. Garden*, 23 C. P. 59; *Roe dem. Brune v. Prideaux*, 10 East. 158. In *In re Woodbury and Marshall*, 19 U. C. R. 597, it did not appear that the defendant gave any proof of his colour of right at the inquest, while in this case the defendant did. If the Judge can decide in this case, there is no case in ejectment in which he cannot do so.

GWYNNE, J.—It is plain that the affidavits complied with all the requirements of 4 Wm. IV., ch. 1, sec. 53, Consol. Stat. U. C., ch. 27, sec. 63; that is to say, it set forth the terms of the original demise, annexing a copy of the instrument containing that demise; a copy of the demand made for delivering up of possession; it stated the refusal of the tenant to go out of possession, and the reason given for such refusal, “adding such explanation in regard to the ground of refusal as the truth of the case may require.”

The applicant then would have been clearly entitled to have had a commission, under the old Act, to summon a jury to enquire “whether the person complained of was tenant to the complainant for a term which has expired, and whether he does wrongfully refuse to go out of possession, having no right or colour of right to continue in possession or how, otherwise.”

I must confess I cannot very well distinguish between the expression “having no right,” and the expression “or colour of right,” in this connection; for, as it seems to me, he who wrongfully refuses to go out of possession is he

who has no right to remain. If he is not wrongful in his refusal, it is because he has a right on his side which justifies his refusal. What perhaps was meant was, that although the person complained of may not have acquired the absolute right to remain, he was nevertheless continuing in possession under a contract for a lease not yet executed, but which contract was capable of being enforced, or for the breach of which the party would be entitled to damages, in which case the Court or a Judge would decline to issue a writ of possession. But it is plain that all the evidence upon the point would have to be taken before the Commissioner, to be returned with the finding of the jury, to enable the Court or a Judge, to whom application should be made for the writ of possession, to exercise a proper discretion in the premises.

The point therefore taken here, as to the jurisdiction of the Judge being ousted, never could have been taken as to the jurisdiction of the Commissioner, whose duty it was to take all the evidence, whatever it might be, and to return it to be dealt with by the Court or a Judge in their discretion, upon the application for the writ of possession.

By a recent statute under which the proceeding in this case has been taken, 31 Vic. ch. 26, O., the Legislature has substituted the Judge of the County Court of the county wherein the land is, not only for the Commissioner under the former Act, but also for the jury and for the Court or Judge who should exercise the discretion of granting or refusing the writ of possession.

That statute applies the remedy to all cases of a tenancy or right of occupancy, whether from week to week, or from month to month, from year to year, and tenancies at will; and all other tenancies, holdings, or occupations, and however determined or put an end to. And it provides that upon similar affidavits being furnished to those required by the former Act, the County Judge "shall appoint a time and place at which he will enquire and *determine* whether the person complained of was tenant to the complainant for a term or period which has expired, or has

been determined by a notice to quit or otherwise, and whether the tenant without any colour of right holds the possession against the right of the landlord, *and whether the tenant does wrongfully* refuse to go out of possession, having no right to continue in possession, or how otherwise."

That the jurisdiction of the Judge to receive all evidence that may be offered before him cannot be ousted by anything appearing *in evidence* before him, any more than the jurisdiction of the Commissioner under the old Act could have been, appears from the sixth section, which provides for the transmission of the proceedings *and evidence*, as the former Act had provided, to either of the Superior Courts, to enable the Court to review the determination of the Judge.

The fifth section provides that if it appears to the County Judge that the case is clearly one coming under the true intent and meaning of the second section of the Act, and that the tenant holds without colour of right against the right of the landlord, then he shall order the issue of the writ of possession. The Judge is bound to exercise his judicial discretion in determining this point; and, when we compare the concluding portion of the third section, wherein the Judge is directed, to enquire and determine whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, with the direction in the fifth section, to issue a writ of possession if he finds that the tenant holds without colour of right, against the right of the landlord, I do not think that we can say that the Legislature contemplated such a wide distinction between the "having no right to continue in possession," and holding "without colour of right" against the right of the landlord, as has been argued before us.

The learned County Judge, in the exercise of his judicial discretion, has arrived at the conclusion, upon the evidence, that the tenant did wrongfully refuse to go out of possession, having no right to continue in possession, as he was directed by the Act to enquire and determine.

Now, if the defendant had no right to continue in possession—and the Judge, as in duty bound, has adjudicated upon this point, and determined that he had none—how could the defendant be said, notwithstanding, to be continuing in possession under colour of right? The Judge has, however, found as a fact that the tenant was holding without colour of right, against the right of the landlord, and therefore he issued the writ of possession, which has been executed.

Now, the duty of this Court, upon the proceedings and evidence being brought before us, under the sixth section of 31 Vic. ch. 26, is to *examine into the proceedings, and if we find cause, we may set aside the same, and we may order a writ to issue to the sheriff, commanding him to restore the tenant to his possession, in order that the question of right, if any appear, may be tried, as in other cases of ejectment.* We are called upon, as it seems to me, to review the exercise of his jurisdiction by the County Judge; and the enquiry before us of necessity involves the enquiry, whether the County Judge has arrived at a correct conclusion or not when he *determined*, that is in effect, *adjudicated*, that the tenant had wrongfully refused to go out of possession, having no right to continue in possession, and that he was holding without colour of right against the right of the landlord; and in a case where, in pursuance of such adjudication, the tenant has been removed and possession has been restored to the landlord, we should be well satisfied that, not only is there a question of right in reality to be tried, but that there is strong reason for believing that it should be found for the tenant's contention, before we should divest the landlord of a possession so judicially recovered, and who may, perhaps, have put another tenant in possession.

In *Wright v Johnson*, 2 U. C. R. 273, the late Sir John Robinson, C. J., says, "The proceeding by landlord against tenant under this statute is beneficial, and should be liberally upheld, being cheaper, and more convenient and expeditious than by ejectment."

It is now, indeed, as it appears to me, *the action of ejectment* which the law provides in cases where the rights of persons who have entered under another, to continue in possession after the expiration of the tenancy or right of occupancy granted, against the will of the grantor of such tenancy or right of occupancy, are to be determined; it is in this character that the Legislature seems to regard the proceeding when it declares the object of our setting aside, if we should set aside, the judgment of the County Judge to be "in order that *the question of right, if any appear, may be tried, as in other cases of ejectment.*"

Reading then the evidence, as I feel bound to do, in this case, I am of opinion that the County Judge came to a right conclusion in determining that the tenant had no right or colour of right for retaining possession as he did, and that in fact there does not appear to be any right to be tried. The Judge had all the parties before him; the whole weight of the evidence went to shew that there never was any agreement arrived at for a new lease, and that the money which was paid was not the old rent, nor by way of any annual rent, but paid by express contract, as remuneration for the tenant having been suffered to remain in possession until the 1st of September, after the expiration of the term. The mere assertion by the tenant of what, by abundant testimony was proved to be false and without any foundation in fact, could never be held to establish a right or colour of right for retaining possession. In *Woodbury v. Marshall*, 19 U. C. R. 597, which was very similar, the case was, as I think every case of this nature must be, entertained upon its merits, and upon the authority of that case, as well as upon principle, this rule, as it appears to me, must be discharged.

HAGARTY, C. J.—I regret that there should be a difference of opinion in this matter. The point of disagreement seems to be this: Has the Legislature placed in the hands of the Judge of the County Court the power of absolutely trying and determining the rights of landlord and tenant to

the possession of premises, investing him, in fact, with the same general power of decision that he has over a personal action under §200, subject to appeal to one of the Superior Courts, or is it a limited power, (as I understand it), to ascertain whether a tenant is overholding without right or colour of right.

To my mind, the distinction between the two things is perfectly plain, and I think the case before us is an excellent illustration of the distinction.

Had I been the County Judge, after hearing all the evidence, my conclusion would certainly have been that the defendant was holding the premises under a *bonâ fide* belief of the existence of a right entitling him so to hold. I would feel that once having ascertained that it was not a mere pretence—an invention as it were—to try and evade the jurisdiction—I was bound to find for the tenant, or, in the words of the Act, to dismiss the case.

If the Judge is to try it absolutely on the merits, I cannot understand why, when, under sec. 6, “the proceedings and evidence” are sent up to the Superior Court, the latter should not absolutely determine the whole merits, and not, as the statute says, “restore the tenant to his possessions in order that the question of right, if any appear, may be tried, as in other cases of ejectment.”

This seems to me to be the most senseless and useless legislation, if not merely the existence of a colour of right, but the absolute question of right or no right, as a defence to the claim of possession, is to be tried by the Judge and determined by him, merely subject to appeal on the general merits to the Superior Court.

I can neither give nor imagine any answer to this suggestion.

The Legislature has not thought proper to give a County Judge the absolute right to try the question of title to property, and the reference in this statute to the trial in an ordinary case of ejectment, seems to me to prove, overwhelmingly, that a different sort of jurisdiction was intended.

The impression left on my mind by the evidence has always been that the original landlord treated the defendant throughout as his tenant, and had no idea of disturbing him, until he got the chance of selling the place to Gilbert.

I think there was a fair question to be submitted to a jury.

I wish to be distinctly understood as finding no fault whatever with the learned Judge deciding in favour of the plaintiff on the evidence before him, assuming his right to try the case absolutely on the merits. Perhaps I should myself have arrived at a like conclusion.

I think the course that the Judge should have taken would be analogous to what is laid down as the duty of Justices, when the act complained of is justified under a claim of right.

In *Regina v. Gridland*, 7 E. & B. 853, Lord Campbell says, at p. 867, "Though no evidence of title was actually offered, it was quite clear that a *bonâ fide* claim of title was set up; and, when such a claim is so set up, it seems to me that justices have no longer jurisdiction to proceed to a summary conviction."

In *Cornwell v. Sanders*, 3 B. & S. 212, Cockburn, C. J., says, "When the party charged asserts title in himself, though the title be only colourable, yet if the assertion be made *bonâ fide* the jurisdiction of the justices falls to the ground. There must, however, be some colour or show of reason for the claim."

In *Regina v. Stimpson*, 4 B. & S. 301, the cases are reviewed. Blackburn, J., says, at p. 309, "They are not to convict where a real question as to the right of property is raised between the parties: then their jurisdiction ceases, and the question of right must be settled by a higher tribunal." And at p. 310 "The question for us is whether there was a reasonable evidence on which the justices could find that a claim of title was not *bonâ fide* set up by defendants. I am of opinion that there was not, and the convictions must be quashed."

I do not wish to be understood as holding the position of the County Judge to be in every respect the same as the convicting justices; but the principle as to the clear dis-

inction between *bond fide* colour of right and right itself, is well established by these cases.

If the Legislature meant here to give the County Judge the absolute right to try the title on the general merits, I repeat, it is an inexplicable mystery to me why, on appeal to us, we should be directed not to decide the right one way or the other, but, in one view of the evidence, to send the questions of right to be tried in an action of ejectment.

GALT, J.—In my opinion this rule should be discharged, on the simple ground that the tenant has shewn nothing which entitled him to retain possession as against his landlord.

Rule discharged.

RAY V. THE CORPORATION OF THE VILLAGE OF PETROLIA.

Sidewalk—Action for not repairing—Evidence—Nonsuit.

The plaintiff while walking along one of the streets of a village tripped on a hinge which projected about two inches above the level of a trap door in the sidewalk, and in endeavouring to recover himself caught his other foot in a depression in the woodwork, about an inch and a quarter deep, at the opposite corner of the trap door, and fell and injured his leg. It appeared that but for the hinge the accident would not have happened, and it was admitted at the trial that the state of the hinge was no evidence of negligence: *Held*, that there was no evidence of negligence on the part of the defendants, and that the plaintiff was properly nonsuited.

DECLARATION. First count: that the defendants wrongfully allowed a trap-door or hinge to remain on a street or highway belonging to them, so as to obstruct it, whereby the plaintiff in walking tripped upon and fell over the trap-door and hinge, and broke his leg, &c.

The second, third, and fourth counts were for the same cause of action, but varied the statement.

Pleas—1. Not guilty. 2. That the action did not accrue within three months. 3. Denying that the road was under defendant's jurisdiction.

The cause was tried before Morrison, J., and a jury, at Sarnia, at the Spring Assizes of 1874.

From the evidence it appeared that opposite an hotel in the village of Petrolia there was a planked way or platform, from the house wall to the regular sidewalk, which was along the street, about four feet wide; that between the line of the sidewalk and the house there was a trap door for the use of the house, opening on hinges; and about twenty inches from the wall one of the iron hinges had become loose and projected a little, about two inches, above the level. The plaintiff, who said he passed and re-passed the place some half a dozen times a day, was walking about noon. He turned to salute or speak to a passing friend, who addressed him, and as he did so he tripped over the hinge, and in recovering himself his other foot caught in a depression in the wood-work, at the opposite corner of the trap-door, about an inch and a quarter below the level, and he fell and injured his leg. He said he would not have fallen, but for the hinge. He said the trap-door was in a dangerous state, as it had sunk a little, and the toe of a person's foot might catch in the corners, as his foot did.

Two or three other witnesses also said they did not consider the trap-door in a safe condition, in consequence of the depression and of the corners being worn away.

One of the plaintiff's witnesses did not consider it dangerous or unsafe.

At the close of the plaintiff's case a nonsuit was asked for on the ground that no case of negligence was clearly made out; that it was not shewn that any notice had been given to the corporation, or that their attention had ever been called to the matter.

The plaintiff's counsel conceded that the state of the hinge was not evidence of negligence, but relied on the state of the trap-door.

The learned Judge thought the case failed, and in deference to his view a nonsuit was taken.

In this term, *A. F. Campbell* obtained a rule *nisi*, to

set aside the nonsuit, on the ground that the case should have been left to the jury.

In the same term, *Robinson*, Q. C., shewed cause. The nonsuit was right and should not be disturbed. It was admitted at the trial that the slight elevation of the hinge was no evidence of negligence. The evidence shews clearly that but for this the plaintiff would not have fallen, and, the mere fact of there being a depression in the trap-door of an inch and a quarter cannot be held to be such evidence. The plaintiff, who passed this place some half a dozen times a day, was fully aware of the depression, and should have taken care to avoid it. It should have been proved, too, that the corporation had notice of the alleged defect. There is another point which might have been important if the case had gone to the jury, namely, that the regular sidewalk was only four feet wide and was four feet from the wall of the house, and the four feet between it and the house in which the trap-door was, was laid down by the proprietor of the house himself. The plaintiff, therefore, in going on this portion was *extra viam*, and the defendants can only be held liable for accidents happening on the regular sidewalk: *McCarthy v. Corporation of Oshawa*, 19 U. C. R. 245. There was clearly no evidence on which a verdict for the plaintiff could be sustained: *Ringland v. Corporation of Toronto*, 23 C. P. 93.

Harrison, Q. C., contra. The American cases have established certain principles, which are applicable to this case. There it has been held that the corporation must keep its highways or streets in repair, so that they are without obstructions and structural defects which endanger the safety of travellers, and are sufficiently level and smooth to enable persons, by the exercise of ordinary care, to travel with safety and convenience, and the liability is held to extend to sidewalks, they being deemed to constitute part of the streets: *Bacon v. City of Boston*, 3 Cush. 174. The liability also extends to the whole width of the street, and not merely to the travelled part: *Regina v. United Kingdom Electric Telegraph Co.*, 3 F. & F. 73; See also *Ringland v. Corporation of Toronto*, 23 C. P. 93;

Tuthill v. West Ham Board of Health, L. R. 8 C. P. 447. The case of *Loan v. City of Boston*, 106 Mass., 450, is much in point. There it was held that an iron box, four inches square, set into the sidewalk of a city by a gas company, for gas purposes, only one or two feet distant from the junction of a crossway with the sidewalk, and so set that its rim projected an inch above the level of the sidewalk, and it was left uncovered and empty to the depth of three inches, is a defect in a highway, for an injury resulting from which the city may be liable. The corporation can have these trap-doors removed, and if they do not do so and they are improperly constructed, or if being properly constructed they get out of repair, they are liable. The evidence clearly shews that this trap-door was improperly constructed, as the hinge projected, and it was unsound and rotten, and that there was a depression in it of an inch and a quarter, caused by persons continually passing over it and wearing it away; and the mere fact of its being a trap-door made it more dangerous, and imposed a greater amount of caution on the corporation. It is not necessary to prove actual knowledge of the defect on the part of the corporation, but if the defect was palpably dangerous, and in a public place, and had existed for a long time, it is sufficient.

HAGARTY, C. J., delivered the judgment of the Court.

The stumble over the projecting hinge appears to me to have been the proximate cause of the injury, in recovering from which the plaintiff put or caught his foot in the depressed corner of the trap. He says he would not have fallen but for the hinge.

I cannot but think that when his counsel gave up the hinge he gave up the case. There would then be nothing left but an inch and a quarter depression in a wooden trap door on or adjoining a wooden side way, which depression but for the stumble over the hinge, would have done no harm.

I suppose there is no Canadian town or village in which such depressions, in the walks themselves, at the junction

of planks, at the crossings, at many other places besides trap-doors cannot be found in numerous instances.

It was necessary for the plaintiff to prove negligence on the part of the defendants. Unless we declare it to be the duty of a village corporation,—when they try to improve the streets, in a place not many years taken from the forest, by laying down wooden sidewalks,—to insure every passer-by against every unevenness or inequality in the levels, we can hardly hold these defendants liable.

I treat this trap-door as part of the sidewalk, and the inequality in the level at its angles, just like an inequality in the boards themselves. An inch and a quarter must be, and we know is, a very common occurrence. The warping of a plank, the starting of a nail, the upheaval of the ground from the action of frost, constantly form inequalities to that extent. Are we to hold that any passer-by, in the broad light of day, stumbling at such a slight variance in the level, is entitled to sue the municipality?

In *Ringland v. Corporation of Toronto*, 23 C. P. 93, this Court considered the rule laid down in *Merrill v. Inhabitants of Hampden*, 26 Maine 234, as sound, namely, that such a state of repair as would exempt the corporation from liability on an indictment, would also exempt them from liability to a civil action.

If this test be fair, it may safely be asserted that this action could never be supported, as no Court could possibly hold that an indictment could be exhibited on evidence like that before us.

The rule is also stated clearly in the case in this Court, that the question “is, not whether there is *literally* no evidence, but whether there is none that ought reasonably to satisfy the jury,” citing *Gee v. Metropolitan R. W. Co.*, L. R. 8 Q. B. 177.

We discussed the same question in *Campbell v. Hill*, 22 C. P. 526 (a).

(a) See same case, in Appeal, 23 C. P. 473.

For the purpose of this case it seems to me enough to state that after the plaintiff's counsel had given up any claim in respect of the projecting hinge, there was nothing left on which a verdict could be reasonably asked, or, if obtained, supported.

Rule discharged (a).

REGINA V. IVY.

Malicious prosecution—Record of acquittal—How obtained.

Semble, that a person tried for felony and acquitted can only obtain a copy of the indictment and record of acquittal, to be used in action for malicious prosecution, on the fiat of the Attorney General; and the granting or refusing such application cannot be reviewed by this Court. The application here was for a rule calling on the Attorney General to shew cause why judgment of acquittal should not be entered on the indictment.

Held, that the indictment not being a record of this Court, or brought into it by *certiorari*, the Court had no jurisdiction.

In this term, *Read*, Q. C., obtained a rule *nisi*, calling upon the Attorney-General to shew cause why judgment of acquittal should not be entered on the indictment for larceny on which the prisoner, William Ivy, had been acquitted.

It was based on an affidavit made by the attorney for the prisoner, stating that he had applied to the proper officer in the Crown Office for a certified copy of the indictment prepared against the said William Ivy at the Court of Oyer and Terminer for the county of Norfolk, and that judgment of acquittal be entered on said indictment, and that both of said requests had been refused by the proper officer: that the said indictment was for larceny, and is now in the Crown office, and a verdict was entered thereon of "not guilty:" that the said copy of the indictment, or of the record of acquittal, was required by the said Ivy for proof of the termination of the said prosecution for larceny, in an action for malicious prosecution brought by him against H. K. and

(a) See *Hutton v. Corporation of Windsor*, 34 U. C. R. 487.

W. W., and now pending, but which could not be tried for want of said record of acquittal; that the said action is brought against the prosecutor in the said prosecution on the charge of larceny, and of which he was acquitted as aforesaid.

In the same term *McKenzie*, Q. C., shewed cause. The question here is, whether a person indicted for felony and acquitted is entitled as matter of course to the record of acquittal. The rule is not very clear, but it seems to be that it can only be obtained on the order of the Court in which the judgment was rendered, in accordance with the rule of 16 Car. II., or on the fiat of the Attorney-General; and in no case will it be granted where there was reasonable and probable cause for the prosecution: *Groenvelt v. Burrell*, 1 Ld. Raym. 253. It is also laid down that, if the record of acquittal be produced at *nisi prius*, the Court cannot enquire into the circumstances under which it was brought forward; but it must be received in evidence, although no order was granted for the delivery of a copy; but the cases deciding this at the same time seem to shew that to obtain a copy an order or fiat is necessary: *Browne v. Cumming*, 10 B. & C. 70; *Lusty v. Magrath*, 6 O. S. 340; *Legatt v. Tollervey*, 14 East 302; *Jordan v. Lewis*, 14 East 305, note. According to *Rex v. Brangan*, 1 Leach C. C. 27, no order is necessary, but it has not been followed in the subsequent cases. Consol. Stat. U. C. ch. 110, sec. 1, shews that any person indicted in any of Her Majesty's Courts may apply to such Court for, and obtain a copy of the indictment; but it expressly says that it shall not be received in evidence in any trial for malicious prosecution.

Read, Q. C., contra. The person indicted for felony and acquitted, is entitled to a copy of the record of acquittal. In *Taylor on Ev.*, 6th ed., vol. ii. p. 1291, sec. 1341, it is said, that it has been doubted whether a person tried for felony and acquitted, is entitled to a copy of the record of his acquittal for the purpose of giving it in evidence in an action for malicious prosecution; but that the doubt has arisen in consequence of the order of the five Judges in the

reign of Charles II., for the regulation of the old Bailey, and that the order is not only at variance with the Act of 46 Ed., III., but wholly inconsistent with the provisions of Magna Charta; and *Rex v. Brangan*, 1 Leach, C. C. 27, is approved of, where Willes, C. J., on being applied to for an order, said that none was necessary, as every person on his acquittal was entitled to the record of acquittal as a matter of course. See also *Doe dem. Earl of Egremont v. Date*, 3 Q. B. 619. The rule, however, of 16 Car. II. only applied to the old Bailey, and cannot be held to extend to Courts here, and the practice here has always been to allow every person on his acquittal to have a copy of the record. The Consol. Stat. U. C. ch. 110, sec. 1, does not apply, as the only object of the Act was to enable persons to prepare for trial, and so it said that the copy should not be used for any other purpose.

HAGARTY, C. J.—The law seems to me to be not very clearly or satisfactorily stated in the books.

The text writers generally assume that the rule of the time of Charles II. is to govern.

In *Chitty* on Criminal Law, 2nd ed., vol. 1, p. 837, it is said, (in reference to actions for malicious prosecution) "A great restraint in this kind of action is, that it cannot be supported in evidence on the trial, without producing the record or a copy of the record of acquittal. And in case of *felony* this can only be obtained by *special order* upon motion made *in open Court*, which will not be granted if there was the least foundation for preferring the indictment; for it would be a great discouragement to public justice, if prosecutors were liable to be sued, whenever the defendant was acquitted."

In *Phillips* on Ev., 10th ed., vol. ii., p. 166, the practice is stated to a like effect, but reference is made to *Browne v. Cumming*, 10 B. & C. 70, in which this seems to be considered a doubtful point. See note.

Saunders on Pl. and Ev., 2nd ed., vol. ii., part i., p. 337, lays down the rule on Lord Holt's authority, with a like reference to *Browne v. Cumming*.

In the last case, there was an application to restrain a plaintiff from using, in the cause, a copy of an indictment alleged to have been improperly obtained. An application had been made to the Attorney-General, who gave his fiat on its being stated to him that Burrough, J., had promised to grant the order, and would have done so had he been authorized. The Attorney-General, being afterwards informed by the learned Judge that he had not promised to grant the order, obtained this rule. Cause was shewn, and the cases reviewed by counsel.

The Attorney-General, (Sir James Scarlett), in reply, says, "It is not necessary to discuss now the right of the party to have a copy of the record of his acquittal, for the decision here will not affect that right. If the plaintiff have it, he may demand a fresh copy and use that in evidence."

Lord Tenterden said, "Taking all the facts of this case into consideration, we do not think there has been a mistake or misrepresentation of such a nature as to call upon this Court to interfere. The rule to restrain the plaintiff from using the copy of the record must therefore be discharged."

Unfortunately no intimation is given by the Court on this question of right. This was in 1829.

The learned Reporters add a note, citing Lord Holt's decision. They say of the Judges' order at Old Bailey, "Quære, what power they had to alter the law?"

Caddy v. Barlow, 1 M. & R. 275, (1827), adopts the rule that the evidence will be received, without enquiry into how it was obtained.

There is also a note by the editors, in which they give the words of the statute, 46, Ed. III., which are certainly very strongly in favor of all persons having right to make search, or exemplification "of whatever record touches them in any manner."

In *Doe dem. Earl of Egremont v. Date*, 3 Q. B. 619, Williams, J., notices the former rule, that no indictment could be produced in evidence without the order of the Court of which it was a record, or the fiat of the Attorney-General;

but he cites *Legatt v. Tollervey*, 14 East 302, to shew that being produced in Court, it was receivable, however obtained.

It is this last case that seems to speak most strongly on the point.

The officer of the Court of Quarter Sessions produced the indictment on which the plaintiff had been acquitted; but as it did not appear that either the Court of Quarter Sessions or the Attorney-General had authorized a copy to be given to the plaintiff, he was nonsuited. The Court set aside the nonsuit, as the evidence should have been received, however obtained.

Lord Ellenborough says, at page 306, "It is very clear that it is the duty of the officer charged with the custody of the records of the Court, not to produce a record, but upon competent authority, *which at the Old Bailey is obtained upon application to the Court, pursuant to the order that has long prevailed there; and with respect to the general records of the realm upon application to the Attorney-General.*" And at page 307, "The order made at the *Old Bailey*, does not state that actions against prosecutors cannot be maintained without an order first obtained for a copy of the indictment, but only that they cannot be maintained without copies."

It must be noted that the Old Bailey order is, "that no copies of any indictment for felony be given without special order upon motion made in open Court at the General Gaol Delivery."

In the case already cited, *Browne v. Cumming*, Burrough, J., (before whom was the acquittal), is stated to have said "That he had not any authority to make such an order except upon motion in open Court at the Assizes, and that the Attorney-General alone had power to do it.

In the only case in our own Court, *Lusty v. Magrath*, 6 O. S. 340, Sir J. Robinson, after stating his view of the practice, notwithstanding the assertion of Willes, C. J., adds, at page 341. "The point does not seem to be quite satisfactorily settled."

The Consol. Stat. U. C. ch. 110, re-enacting 6 Wm. IV., ch. 44, sec. 2, (cited in *Lusty v. Magrath*,) after providing that any person indicted for felony or misdemeanour, may apply to the Court and obtain a copy of the indictment, paying therefor, "*But such copy shall not be received in evidence upon any trial for a malicious prosecution.*"

In *Taylor* on Ev. 6th ed., p. 1291, sec. 1341, it is strongly urged that the view of Willes, C. J., is right, and the Judges order of Charles II., illegal, and directly at variance with 46 Edward III., and apparently inconsistent with the Magna Charta, "*Nulli vendemus, aut differemus rectum vel justitiam.*" Mr. Taylor puts it thus: "It has been doubted whether a person *tried for felony, and acquitted, is entitled to a copy of the record of his acquittal for the purpose of giving it in evidence in an action for malicious arrest.*"

I must say, for myself, that I cannot help sharing Mr. Taylor's doubt, as to the legality of the alleged practice. My chief difficulty is, that I can find no adjudged case in which it has been ruled, as the *ratio decidendi*, that the copy shall not be given by the Crown officers without the leave of the Judge or Court. I mean where the right of the subject to obtain the copy after acquittal has been the question to be decided, and when the right was distinctly denied or refused. Still it seems difficult to avoid the conclusion that the practice has for a long series of years, been considered to be as urged here by the counsel for the Crown.

It is, however, impossible for us to grant the rule as asked.

This Court has no custody or control of the indictment. It is not a record of this Court, and we have no right to direct the Crown to enter judgment, nor could we order an exemplification of it. At all events, until brought within our cognizance by *certiorari*, or otherwise, we have no jurisdiction whatever.

"The Court," referred to in the order of Charles II., is the Old Bailey Court.

If we strive to apply the order here, it must be either

the Court of General Gaol Delivery, of which it is [a record, or at farthest, some Court to which it has been returned, or of which it is made a record.

In the oft-cited case before Lord Holt, the application did not raise our point. It was for an order on the College of Physicians to permit the plaintiff to have copies of their proceedings and judgment, to reply to the plea in an action for false imprisonment, to which there was a justification under the judgment of the College.

The Court say, "If the Lord of the Manor claims land by forfeiture of his tenant for felony, he has a right to have a copy of the conviction, and he shall have it exemplified ; but a man cannot have a copy of a conviction of treason or felony without leave of the Attorney-General."

This may be read in connection with the language already cited of Lord Ellenborough.

Looking at the declared meaning of the rule of Charles II., there is no one here who can decide on the merits of the application, except the Judge who tried the felony case.

Burrough, J., who tried the plaintiff in *Browne v. Cumming*, said he had no jurisdiction to give an order for the copy of the indictment.

On the whole, I incline to the opinion that, considering the utterly unsatisfactory state of the law on the subject, a party acquitted of felony can only get a copy of the indictment and record of acquittal, on the fiat of the Attorney-General. The granting or refusing of this fiat, is in the discretion of the Attorney-General. He can hear both parties by counsel, if he think proper. See *In re Newton*, 16 C. B. 97. The remarks of Jervis, C. J., in that case, are worthy of perusal, as to the duty of the Attorney-General. He instances his own refusal of the fiat when Attorney-General, for a writ of Error, in the well known case of the *Mannings*, where the prisoners were executed. (a)

(a) See also Corner's Crown Practice, 126, "In felony, a copy of the indictment is not granted to the defendant without the fiat of the Attorney-General;" again, at page 133—This would appear to refer to him before trial.

GWYNNE, J.—It certainly seems to be the universal practice prevailing in England, that a person acquitted of felony shall not have a copy of the indictment and acquittal, for the purpose of being used in evidence in an action for malicious prosecution, without an order of the Court or the fiat of the Attorney General. The cases are all collected in *Stephen's Nisi Prius* vol. 3, p. 2287. But the Court competent to give the order, is the Court of Oyer and Terminer and Gaol Delivery, where the trial took place, and not one of the Superior Courts, as appears from *Groenvelt v. Burrell*, 1 Ld. Raym. 253, Carth. 421; *Caddy v. Barlow*, 1 M. & R. 275; *Legatt v. Tollervey*, 14 East 305; and the Court of Gaol Delivery never will grant the order when there was probable cause for the prosecution, for the reason, as is said in *Groenvelt v. Burrell*, Carth. 421, that the Court will never help any litigious suit.

The refusal of the Attorney General to grant his fiat for a writ of Error cannot be reviewed by the Court, although it is said that in a proper case the fiat is due *ex debito justitiæ*. The discretion which the Attorney General exercises as to granting or refusing his fiat, is in the nature of a judicial function for which he may be responsible in Parliament, but not to the Court. His decision cannot be reviewed by the Court. This has been expressly decided in *Ex parte Newton*, 4 E. & B. 869.

If the decision of the Attorney General cannot be reviewed by the Court in so grave a matter as his refusal to grant his fiat for a writ of Error, *a fortiori* it cannot be reviewed in the matter of his refusal to grant his fiat for the giving a copy of an indictment with the record of a verdict of acquittal thereon, to enable a person, who may have been acquitted in the face of strong evidence of guilt, (and for whose prosecution there may have been the most reasonable cause), to harass the prosecutor with an action for malicious prosecution.

When the fiat of the Attorney-General is obtained for a writ of Error, on delivery of the writ to the Clerk, it appears from *Archbold's Crown Practice*, 202, that for the purpose of returning it, the Clerk sets out the proceedings, and the formal judgment is added, according to a form there given.

If the constitution can with safety entrust to the Attorney General, without review by the Court, the determination of the question whether or not a writ of Error shall be granted in a case perhaps affecting the life of the subject, surely his discretion should not be interfered with, if he refuses to assist in the promotion of what may, perhaps, be a harassing and vexatious litigation.

The legislature has shewn its sense of the propriety of protecting prosecutors in criminal cases from having the record of the prosecution used in evidence against them in actions for malicious prosecution; for the Consol. Stat. U. C. ch. 90, while it provides for the giving to every person indicted for felony or misdemeanor, a copy of the indictment to be furnished by the Clerk of the Court where the indictment is, expressly enacts that such copy shall not be received in evidence upon any trial for malicious prosecution.

The practice, as it appears to me, is too well established now to admit of doubt, that it rests with the Attorney General to grant or refuse to the applicant here the copy of the indictment required, and that he exercises a judicial function in determining the question. If it be made to appear to him that in the particular case it ought to be granted, then *ex debito justitiæ*, it ought to be granted; but if it be made to appear to him that it ought not to be granted, then *ex debito justitiæ*, he ought to refuse it.

It is in the interest of public justice that prosecutors should be protected from harassing litigation, if it should appear that there was reasonable cause for the prosecution, notwithstanding an acquittal; and the proper persons to exercise the discretion, which we in utter ignorance of the circumstances are called upon to exercise, is the judge presiding at the Court of Oyer and Terminer, or the Attorney General.

GALT, J., concurred.

Rule discharged.

JACKSON V. RANDALL.

Absconding debtor—Setting aside.

Held, that the absence of any express provision in C. S. U. C. ch. 25, for setting aside a writ of attachment against an absconding debtor, does not prevent the Court from doing so in the exercise of its common law power over its own process; and that such power can also be exercised by a Judge in Chambers as the delegate of the Court.

In this term *F. Osler* obtained a rule *nisi* to set aside an order made in Chambers by Mr. Justice Wilson, on the ground that he had no jurisdiction to make the order, and on the merits. The rule was granted on reading the summons and order, and the affidavits and papers filed in Chambers. The order was dated the 15th April, 1874, and was that the attachment issued by the Judge of the County Court of the County of Waterloo, against the defendant as an absconding debtor, be set aside and vacated as against certain claimants therein mentioned, but that as against the defendant it should stand as an ordinary process only, to which the defendant should appear; that the seizure under the writ be set aside and vacated, and the goods seized delivered up; and also setting aside an interpleader order between certain claimants and the plaintiff; and that the bond should be given up; and that the plaintiff should pay to the defendant the costs of and incidental to this application, and to the sheriff the costs of and incidental to the execution of the writ of attachment, and the costs of and incidental to his application on the interpleader; and restraining the claimants from suing the sheriff, and restraining the defendant from suing the plaintiff or the sheriff.

In the same term *J. B. Read* shewed cause. The writ of attachment was properly set aside, as at the time the attachment issued there was no debt due, and the defendant was not a resident of the province: *Brown v. Brown*, 10 U. C. R. 393; *Higgins v. Brady*, 10 U. C. L. J. 268. As to the jurisdiction of the Judge in Chambers, he has

clearly jurisdiction to prevent the process of the Court from being abused. If not, any merchant going home and owing a small sum of money might be arrested.

F. Osler and Roe, contra. The Judge in Chambers had no power to set aside the writ of attachment issued by the County Judge against the defendant as an absconding debtor. The power of the County Judge is the same as that of a Superior Court Judge, and the Judge in Chambers cannot exercise an appellate jurisdiction, either on the original matter or in connection with new matter brought before him: *Damer v. Busby*, 5 P. R. 356; *Brown v. Brown*, 10 U. C. R. 493. In *Howland v. Rowe*, 25 U. C. R. 467, it was held that the Judge in Chambers might interfere in the case of a mere irregularity. But this was previous to the case of *Damer v. Busby*, where it was held that the application must be to the full Court. As to the merits, the affidavits shew that the defendant was a resident of the Province in November, 1873, when the writ of attachment issued, and was indebted to the plaintiff for his share in certain wheat losses: *Burness v. Guiranovick*, 4 Ex. 520; *Smith v. Niagara Harbour and Dock Co.*, 6 O. S. 555.

HAGARTY, C. J., delivered the judgment of the Court.

We have read the affidavits and papers filed, and we have also been favoured with a copy of the judgment delivered. We fully agree with the learned Judge in his decision in favour of the defendant on the general merits. The only point requiring consideration is the right of a Judge in Chambers to set aside the writ.

The Absconding Debtors' Act, Consol. Stat. U. C. ch. 25, contains no special provision for setting aside the attachment. Section 20 provides that, "If at any time before execution issues, it appears to the Court upon motion, and upon hearing the parties by affidavit, that the defendant was not an absconding debtor within the meaning of this Act, at the time of the suing out, of the writ of attachment against him, such defendant shall recover his

costs of defence and the plaintiff shall, by rule of Court, be disabled from taking out any writ of execution for the amount " recovered, except for a sum beyond the defendant's costs, &c.

There is no provision like that in the Common Law Procedure Act as to arrests, sec. 31.

But the absence of any express provision to set aside process can never be, we think, affect the right of the Court to interfere to prevent the abuse of its process ; and for a long series of years we find our Courts unhesitatingly exercising such power. The learned Judge has mentioned some of the authorities.

Then can the Judge in Chambers do what this Court clearly can do ?

The case of *Smeeton v. Collier*, 1 Ex. 457, is a direct authority. The head-note sums up the result : " Where a statute, in general terms and without any special limitation, either express or to be inferred from its terms, gives any power to one of the Superior Courts, that power may be exercised by a Judge at Chambers as the delegate of the Court."

The judgment of Parke, B., is very clear on the point.

This case is cited in *In re Allen*, 31 U. C. R. 458, at page 491, and the general question as to orders in Chambers and the right of the Court to review them is much considered.

It is, of course, to be considered that here there is no express legislative authority to either the Court or a Judge to set aside the attachment, and the right has to rest on the general power of the Court over its process.

The Judge in this case must be considered as sitting in Chambers as " the deputy of the Court disposing of applications which, but for the press of business, would be disposed of by the Court itself." See also the cases in the note to *Kilkenny, &c.. R. W. Co. v. Feilden*, 6 Ex. 83.

In this class of cases the Court can and will review the Judge's decision ; but it may be otherwise when the Judge in Chambers has an independent jurisdiction. See same note.

Most of the cases are cited in *In re Allen*.

According to *Smeeton v. Collier*, Pollock, C. B., says : "Where the Legislature simply gives a power to the Court, it is to be taken that the Court receives all the ordinary powers necessary for that purpose ; and it is intended that the Judge should exercise these powers. No distinction exists between powers conferred by statute, and those existing at common law, unless a distinction is to be gathered from the terms of the statute."

Alderson, B., says : "I take it to be clear, that, where the Legislature gives the Court any powers in general terms, and without any express limitation, it is the same as if these powers were given by the common law."

The common law power of the Court over its own process can, therefore, be exercised by a Judge in Chambers. It was never doubted, we think, that, at all events as to mesne process, the power to set aside could be exercised in Chambers.

Agreeing, as we do, with the decision of the learned Judge on the merits, it is of little consequence, except as to costs, what our view might be of his jurisdiction. We directed a motion paper to be put in, so that, if necessary, the court could make an order on the same terms.

Mr. Justice Wilson is not a Judge of this Court ; but sitting in Chambers he has the like powers. By Consol. Stat. U. C., ch. 10, sec. 10, "The Chief Justices and Judges of the said respective Courts shall," &c., "sit in Chambers or elsewhere, and there transact any such business as may be transacted in either of the said Courts by a single Judge out of Court, whether such business be in the Court of which such Judge is a member or in the other Court, subject to the right of appeal to and of review by the full Court in which the matter may be depending."

Rule discharged with costs.

ROISSIER V. WESTBROOK ET. AL.

Attorney—Unauthorized appearance.

Where a plaintiff had served only one of three defendants, who without authority directed an appearance to be entered for all three, and the plaintiff obtained a verdict. *Held*, following *Bayley v. Buckland*, 1 Ex 1, that the verdict must be set aside.

In this term, *J. K. Kerr* obtained a rule *nisi*, calling upon the plaintiff to shew cause why the appearance entered in this cause for the defendants Gifford and Kent, and all subsequent proceedings in the cause, so far as respects the said defendants, and the verdict in the cause, should not be set aside with costs, and the said last named defendants let in to defend in the cause, on the ground that the said defendants were not served with the writ of summons in the cause, or with any notice or copy of the same, and had no notice or knowledge of the same, and the said appearance was wholly unauthorized by the said defendants, and the said defendants had no notice or knowledge of and did not authorize any of the other proceedings in the said suit. And on the ground that the said defendants had a good defence to this action on the merits; and on affidavits.

It appeared from the affidavits, that the action was ejectment against the three defendants, tried before Wilson, J., at Woodstock, at the Spring Assizes of 1874, when a verdict was entered for the plaintiff, no counsel appearing for the defendants.

It also appeared from the affidavits that a summons was issued against the three defendants, but was served only on Westbrook. Westbrook took it upon himself to instruct an attorney to enter an appearance, not only for himself but for the other two, and he swore that he did this without any authority from them, and they each swore that they were never served with any writ, process, or proceeding whatever in this cause.

The defendant *Gifford* stated that he was not aware that this suit was instituted or that proceedings had been

taken against him, until the 31st March, 1874, when he was informed by Westbrook that the case was to be tried at the Woodstock Assizes, to commence on the 2nd April. He further stated that he never instructed M., the attorney, who entered the appearance for him, nor his partner, nor any other person whosoever, to defend this action for him, nor did he authorize any one to do so for him.

The defendant *Kent* stated that he never knew that proceedings were taken against him in this cause, until the evening of the 2nd April, and after a verdict had been entered against him, and that he never authorized any person to enter an appearance for him, nor did he authorize any other person to do so.

In the same term *Harrison*, Q. C., shewed cause. The defendants' affidavits should have disclosed merits, and not having done so, are bad: *Vidal v. Bank of Upper Canada*, 15 C. P. 421; *Bank of Montreal v. Harrison*, 4 P. R. 331. The proceedings should not be set aside, but the defendant should be left to his remedy against the attorney. *Bayley v. Buckland*, 1 Ex. 1, seems to favor the defendants' contention, but it was decided in 1844 and has not been followed. In *Massey v. Rapelje*, 5 C. P. 134, the proceedings were set aside, but because the defendant disclosed merits. See, also, *Warely v. Poapst*, 7 U. C. L. J. 294. The correct rule, however, is stated in 1 *Salk.* 86. There it is said, "Where an attorney takes upon him to appear, the Court looks no farther, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him." And at page 88 the same rule is laid down, though qualified, namely, "If the attorney be able and responsible we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him." Therefore, if the attorney be solvent, and as it is not shewn here that he is not, the remedy must be against him."

J. K. Kerr, contra. The case of *Bayley v. Buckland*, 1 Ex. 1, decides that where the plaintiff, without serving a

defendant, accepts an appearance of an unauthorized attorney for defendant, the Court will set aside the judgment as irregular with costs, and leave the plaintiff to recover those costs, and the expense to which he has been put, from the delinquent attorney by summary proceedings. This is exactly in point, and the affidavit there is similar to the one here, and there is no necessity to disclose merits. See, also, *Hambidge v. De la Crouée*, 3 C. B. 742; *Williams v. Smith*, 1 Dowl. 632; *Stanhope v. Firmin*, 3 Bing. N. C. 301.

GALT, J., delivered the judgment of the Court.

The rule laid down in the case of *Bayley v. Buckland*, 1 Ex. 1, appears to be that now followed, and is cited as the law in *Fisher's Digest*, Tit. *Practice*, 6930, and also in *Chitty's Arch. Prac.*, 12th ed., p. 90.

It is as follows: "We are disposed to lay down a different rule, and to confine the liability of the defendant to cases in which the course of the proceedings has given him notice of the action being brought against him. When, therefore, a defendant has been served with process, and an attorney without authority appears for him, we think the Court must proceed as if the attorney really had authority, because, in that case, the defendant having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he has any defence on the merits. There the plaintiff is without blame, and the defendant is guilty of negligence. But even in that case, if the attorney be not solvent, we should relieve the defendant upon equitable terms, if he had a defence on the merits. If the attorney were solvent, it would not be unjust to leave the defendant to his remedy by summary application against him. On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so;

and upon the same principle on which we before proceeded, we must set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs and the expense to which he has been put, from the delinquent attorney by summary proceedings. * * Now applying these principles to the present case, it is clear that the judgment is irregular, and the rule must be absolute for setting it aside."

The case before us is within the above rule, and, therefore, this rule will be made absolute.

Rule absolute.

TILTON V. MCKAY.

Foreign judgment—Proof of—Personal service—Waiver of.

To prove a judgment recovered in Lower Canada an instrument was produced, headed, "Province of Quebec, District of Montreal, Superior Court of Lower Canada," and setting out the judgment of the Court, and certified to be a true copy under the hand of the prothonotary and the seal of the Court: *Held*, sufficient, under C. S. U. C. ch. 80, sec. 1.

It was also objected that the judgment was not sufficient, as the defendant had not been personally served with process in the action in the foreign Court; but *held*, as defendant had procured bail to be put in, and so obtained his freight, which had been attached, the objection could not be raised.

THIS was an action brought on a judgment recovered in Lower Canada, tried before Hagarty, C. J., without a jury, at Toronto, at the Spring Assizes of 1874.

During the trial, a document was produced, purporting to be under the seal of the Superior Court of Lower Canada, but which was not in the form used in exemplifications in this Province, or in England.

The instrument was as follows :—

Province of Quebec, } SUPERIOR COURT OF LOWER CANADA.
 District of Montreal. } Monday, the thirtieth day of June,
 one thousand eight hundred and seventy-three.

No. 2057.

Present—The Honorable Mr. Justice Torrance.

Then followed a copy of the judgment, which was stated to have been recovered in an action for breach of a contract made by the defendant to carry in his vessel, a cargo of wheat for the plaintiff, and concluded :—

(True copy),
HUBERT, PAPINEAU & HONEY,
P. S. C.

We, the undersigned, René Auguste Richard Hubert, Louis Joseph Armdú Papineau, and John Sleep Honey, Prothonotaries in the District of Montreal, of the Superior Court of Lower Canada, do hereby certify the foregoing to be a true copy of the final judgment rendered in the said action, by the said Court, on the 30th day of June 1873, and that the same is duly certified under our official signature.

Given under our hand, and the seal of the said Court, at the city of Montreal, in the Province of Quebec, on the fifteenth day of September, one thousand eight hundred and seventy-three.

[Stamp.]
[Superior Court,
Lower Canada.]

HUBERT PAPINEAU & HONEY,
P. S. C.

On this instrument being produced, it was objected by the counsel for the defendant that it was not an exemplification; only a copy of the judgment, certified by the Prothonotary, and the seal of the Superior Court. This objection was over-ruled.

The learned counsel then offered evidence to impugn the merits of the judgment, as service of process had not been personal, which was rejected, as it was proved that the defendant after service on his purser had procured bail to be put in to the action, and on that obtained some freight of his that had been attached, the learned Chief Justice holding that this was the same as personal service.

The learned Chief Justice entered a verdict for the plaintiff, and granted a certificate for immediate execution.

In this term, *Lash* obtained a rule *nisi*, calling on the plaintiff to shew cause why the judgment entered herein and execution issued thereon, the certificate of immediate

execution, and the verdict for the plaintiff herein, should not be set aside, and a nonsuit entered, or verdict for defendant, pursuant to the Law Reform Act, and amendments thereto, on the grounds taken at the trial; or why the said verdict should not be set aside and a new trial had between the parties, on the ground that the learned Judge who tried the cause improperly rejected evidence tendered by the defendant as to the original cause of action on which the judgment sued on was obtained.

In the same term *McMahon* shewed cause. The Consol. Stat. C., ch. 80, sec. 1, shews that a foreign judgment may be proved by an exemplification under the seal of the Court in which the judgment was rendered. It was contended by the defendant, that the document in question was not an exemplification, and *Hesketh v. Ward*, 17 C. P. 190, was relied on; but there the exemplification was not certified under the seal of the Court, and was not in accordance with the requirements of the English Act, or of the Court of Exchequer. Under our Act all that is necessary is, that it should be certified under the seal of the Court, as was done here. In *Junkin v. Davis*, 6 C. P. 408, the exemplification was very similar to the present one, though not so full. It consisted of a certified copy of the proceedings in the Court, and was stated to be under the hand and seal of office of the clerk, but the seal of the Court affixed appeared on its face to be of the 14th, instead of the 10th judicial district, and on that ground was refused; but in other respects it was considered sufficient. In *Woodruff v. Walling*, 12 U. C. R. 501, also, a similar document to the present was held sufficient. See also *Smith v. McGowan*, 11 U. C. R. 399, 12 U. C. R. 270. All the cases shew that no particular form is required. Then as to the point of the non-personal service. The evidence shews that the writ was served on the son, and that he sent it to his father, who next morning put in bail, and obtained a release of the attachment. This clearly shews that the father had notice of the proceedings, and defended himself. *Montreal Mining Co. v. Cuth-*

bertson, 9 U. C. R. 78, is in point. There, to a declaration on a judgment of the Superior Court of Montreal, the defendant pleaded that he was not served with nor had notice of the process, nor did he appear thereto ; but it was held bad, as it did not shew that the proceedings were so conducted as to deprive the defendant of the opportunity of defending himself.

Lash contra.—An exemplification is a formal instrument in the nature of a writ, commencing “Victoria,” &c., under the seal of the Court, and tested in the name of the Chief Justice. It must be something issuing from the Court, and not from the officer. At common law the judgment could only be proved by the production of the original itself, and when the statute authorized an exemplification to be used instead, it did not mean a mere copy from the clerk, but something of a higher nature proceeding from the Court itself. In *Hesketh v. Ward*, 17 C. P. 190, the document was more formal, than the one here, and yet it was held insufficient. There it is said, “The form of that proceeding is like other writs running in the name of the Sovereign, and tested, when under the seal of the Court, in the name of the Chief Justice of the Court. Such an instrument as this we could not receive as an exemplification from our own Court. It does not profess to be more than an office copy, or certified copy, and we cannot rate it as anything more.” This clearly shews that the document in question is not an exemplification, but only an office copy or certified copy. See also *Taylor on Ev.*, 6th ed., vol. ii. p. 1322–3, sec. 1378. As to the other point, the defendant was not served, did not appear, and in fact never defended, and therefore the evidence offered should not have been rejected.

GALT J., delivered the judgment of the Court.

By Consol. Stat. C., ch. 80, sec. 1, it is enacted that “any judgment, decree or other judicial proceeding, recovered, made, had or taken, in any of the Superior Courts of Law, Equity or Bankruptcy, in England, Ireland, or Scotland, or

in any Court of Record in Lower Canada," &c., "may be proved in any suit, action or proceeding, either at Law or Equity, in Upper Canada, in which proof of any such judgment, decree, or judicial proceeding, may be necessary or required, by an exemplification of the same under the seal of the said Courts respectively, without any proof of the authenticity of such seal, or other proof whatever, in the same manner as any judgment, decree, or similar judicial proceeding of any of the Superior Courts of Common Law or Equity in Upper Canada may be proved by an exemplification thereof in any judicial or other proceeding in the said last mentioned Courts respectively."

The question then arises, what is an "Exemplification?" In *Wharton's Law Lexicon*, 4th ed., p. 374, it is thus defined: "Exemplification, a copy; a certified transcript, either under the Great Seal, or under the seal of a particular court."

In *Taylor on Ev.*, 6th ed. vol. ii., p. 1323, sec. 1378, in speaking of Courts of Justice and other judicial writings, it is said, "Now the records of the Superior Courts may either be proved by the mere production of the *originals*, or,—as this course would be highly inconvenient to the public if generally adopted, since it might lead to the mutilation or loss of valuable documents,—they may also be proved by means of *copies*. Of these there are four kinds, viz., exemplification under the Great Seal; exemplifications under the seal of the particular Court, where the record remains; office copies; and examined copies."

Lord Chief Baron Gilbert, in his treatise on Evidence, 6th ed., p. 11, from which in fact the definition of an exemplification is taken by all the law writers since his time says, "The next thing is the copies of all other records, and they are two-fold. Under seal, and not under seal. First, under seal, and these are called by a particular name, Exemplifications, and are of better credit than any sworn copy: for the Courts of justice that put their seals to the copy, are supposed more capable to examine, and more exact and critical in their examinations, than any other person is or can be.

He then says, at page 12, "Exemplifications are twofold: under the broad seal, or under the seal of the Court." After describing an exemplification under the broad seal, at page 14, he proceeds. "The second sort of copies under seal, are the exemplifications under the seal of the Court, and these are of higher credit than a sworn copy, for the reasons formerly given."

It appears to us from the foregoing authorities, that, beyond all doubt, the meaning of the word "exemplification" is a copy certified either under the great or broad seal, or under the seal of a Court of justice; and therefore that when the legislature say, that any judgment of any Court of Record in Lower Canada may be proved in any suit in Upper Canada, by an exemplification under the seal of the same, they mean that such judgment should be proved by an instrument purporting to be a copy and certified to be under the seal of the Court.

The case of *Hesketh v. Ward*, 17 C. P. 190, was relied on by the counsel for the defendant, but that was an action brought upon a judgment obtained in the Court, of Exchequer in England, and the instrument produced in evidence was certainly not such an exemplification as would have been received in England in proof of a record of that Court on the trial of an issue in any other Court in England, and consequently was not admissible under the Imp. Stat. 14 & 15 Vic. ch. 99; nor was it certified under the seal of the Court.

Some stress is laid by the learned Judge who delivered that judgment as to the form in which the document was drawn, which was certainly not in accordance with the forms used in England, or in Upper Canada; but the judgment before us is one from Lower Canada, and must, in the absence of all proof to the contrary, be assumed to be in the form recognized in that Province; and as it is a copy under the seal of the Court, we must in my opinion, consider it as one of those instruments which are referred to by the Legislature as exemplifications.

In the case of *Junkin v. Davis*, 6 C. P. 408, which was

an action on a judgment recovered in one of the Courts of the United States, the exemplification was in the same form as the one now before us, and although the majority of the Court held that the instrument could not be received, it was rejected, not on account of any objection to the form, but because on the face of the seal it did not purport to be the seal of the Court in which the judgment had been recovered, but of another Court.

In *Woodruff v. Walling*, 12 U. C. R. 501, the document was very similar to the present, and no objection was taken on that ground.

It appears to us, therefore, that the first objection fails, both on principle and authority.

As to the second objection. The evidence was perfectly clear that the defendant had notice of the proceedings in the Lower Canada Court; that he obtained a release of an attachment, which had been issued against his freight, and had put in bail to the action.

The case of *Montreal Mining Co. v. Cuthbertson*, 9 U. C. R. 78, shews that had the facts of this case been set forth on the record, the plea of want of personal service would have been bad.

Rule discharged.

McCANDY V. TUER ET AL.

Married woman—Right to receive wages—35 Vic. ch. 16, O.

Held, that under 35 Vic., ch. 16, sec. 1, O., a married woman can maintain an action for her wages, earned whilst living with her husband, who as agent of the defendants employed her; and that her husband is a competent witness in her behalf.

DECLARATION on the common counts, for goods sold, and wages, &c.

Pleas: never indebted, and payment. Issue.

The cause was tried at Lindsay, before Galt, J., and a jury, at the Spring Assizes of 1874.

The defendants were lumberers, and authorized the husband of the plaintiff to hire persons for their shanty. He did so, and made an arrangement with the plaintiff, his wife, to go up to the shanty and act as cook, which she did. When she was hired she was not living apart from her husband, or in any way separated from him, and when she acted as cook they lived together at the shanty. She was married in 1871.

The husband was called as a witness by the plaintiff, and proved her case.

The jury found for the plaintiff with \$30 damages, being a balance of a larger claim; but leave was reserved to the defendants to move to enter a verdict in their favor, if the Court should be of opinion that the action would not lie under the circumstances of the case.

In this term *J. K. Kerr* obtained a rule *nisi* accordingly.

In the same term *Hector Cameron*, Q. C., shewed cause. The plaintiff is entitled to recover, as 35 Vic., ch. 16, sec. 1, O., gives her an absolute right to her "wages and personal earnings," without any order of protection, or under the circumstances required by the Consol. Stat. U. C., ch. 73, secs. 5 and 6. The evidence shews an express contract of hiring. At all events, she is entitled to recover under an implied contract for the value of her services, and, certainly,

\$30 cannot be considered unreasonable. It was simply a question of fact for the jury, and they found for the plaintiff.

J. K. Kerr, contra. If the plaintiff is entitled to recover, there is no objection to the amount of the damages. There is no express contract between the defendants and the husband of the plaintiff as to the hiring of the plaintiff. If an implied contract be relied on it cannot be maintained, unless it be proved that the defendants were aware of the plaintiff being there, and acquiesced in it. The plaintiff, in any event, cannot recover; for the wages and earnings must be her separate wages and earnings, and they cannot be said to be so when she is living with her husband. She must be living apart from him. The only difference which the Act of 35 Vic., ch. 16, sec. 1, makes, is that in the cases in which, by the Consol. Stat. U. C., ch. 73, secs. 5 and 6, she was entitled to her earnings on obtaining an order of protection, in the same cases only she is now entitled without such order: *McGuire v. McGuire*, 23 C. P. 123; *Merrick v. Sherwood*, 22 C. P. 467; *Dingman v. Austin*, 33 U. C. R. 190; *Steels v. Hulman*, 33 U. C. R. 471.

HAGARTY, C. J.—The merits need not be entered into. The legal objection that the action will not lie under such circumstances is a very serious one.

Unless the recent legislation expressly sanctions an action of this kind, it is, of course, impossible to maintain it.

If she can sue in her own name for her wages and personal services whilst living with her husband, I can see no legal objection to her proving her case by her husband's evidence, if the jury chose to believe it.

The decision must depend on the construction of section 2, of the late Act, 35 Vic., ch. 16, O.

In two cases in this Court this Act has been considered: *Merrick v. Sherwood*, 22 C. P. 467; *McGuire v. McGuire*, 23 C. P. 123. The Judges there have remarked fully on the general bearing of the statute, but the point now in judgment is not expressly decided.

Sec. 2 declares (1). All the wages and personal earnings of a married woman, and any acquisition therefrom; and (2), all proceeds or profits, from any occupation or trade which she carries on separately from her husband; or (3), derived from any literary, artistic, or scientific skill, and all investments of such wages, earnings, moneys, or property shall hereafter be free from the debts or disposition of the husband, and shall be held and enjoyed by such married woman, and disposed of without her husband's consent as fully as if she were a *feme sole*; and no order for protection shall hereafter become necessary, in respect of any of such earnings or acquisitions, and the possession, whether actual or constructive, of the husband of any personal property of any married woman, shall not render the same liable for his debts.

The figures 1, 2, and 3 are not to be found in the statute. I insert them as shewing how, in my mind, there are three distinct classes of cases to which the clause applies; and so, it seems to me, the language used must, in its ordinary, grammatical sense, be held to divide them.

Firstly. She is to have her wages and personal earnings; secondly, all proceeds or profits from any occupation or trade which she carries on separately from her husband; thirdly, the proceeds or profits of any literary, artistic, or scientific skill.

The Legislature seem to except from the general right the proceeds and profits of any occupation or trade, *not* carried on separately from her husband, giving the character of separate property to all other things mentioned in the section.

Consol. Stat. U. C. ch. 73, sec. 6, allows a married woman, in certain prescribed cases, to obtain an order of protection, entitling her to her earnings, &c.

The preceding section, 5, declares that no married woman shall be entitled to her earnings during coverture, without an order of protection, as thereafter provided.

The Ontario Act declares that no order of protection shall thereafter become necessary. And in sec. 9 it is de-

clared that any married woman may maintain an action in her own name for the recovery of wages, earnings, money, and property by this or any other Act declared to be her separate property.

The whole question here, therefore, is whether the earnings and wages now claimed are by the Act made her separate property.

I do not see how we can read the second section, except as bearing the construction claimed by the plaintiff.

It may be that, as defendants contend, this construction gives a further facility for the committing of frauds—already unfortunately too common, under the wide divergence from the former law as to husband and wife—and it may startle a good many lawyers to be told that our construction of the Act enables a woman, living with her husband, to claim her daily or other earnings as her separate property, and sue for and recover them in her own name, and invest the proceeds in furniture or anything else she pleases. It is rather destructive of the old-fashioned ideas of community of interest, and community of exertion and labour, for the maintenance of a family.

We are not responsible for the consequences of an Act of the Legislature, we can only try to ascertain its true meaning.

GWYNNE, J.—Section 5, of ch, 73, of the Consol. Stat., enacted that “no married woman shall be entitled to her earnings during coverture, without an order of protection, under provisions hereinafter contained.”

Sec. 6 enabled certain classes only of married women to get this order of protection: namely, a married woman having a decree for alimony against her husband; or a married woman living apart from her husband, being obliged to leave him for cruelty or other cause, which, by law, justifies her leaving him, and renders him liable for her support; or a married woman whose husband is a lunatic, with or without lucid intervals; or a married woman whose husband is undergoing sentence or imprison-

ment in the Provincial Penitentiary, or in any gaol for a criminal offence; and other married women particularly described in this section.

Then the statute 35 Vic., ch. 16, O., was passed, as its title declares "to *extend* the rights of property of married women," not, it is to be observed, any particular class or classes of married women, but married women generally.

The second section of this Act enacts that "All the wages and personal earnings of a married woman, or any acquisitions therefrom, shall be held and enjoyed by such married woman, and disposed of without her husband's consent as fully as if she was a *feme sole*"; and to shew that the section was intended to apply to *all* married women, as distinct from the particular classes in the Consol. Stat., ch. 73, sec. 6, mentioned, the section proceeds, "and no order for protection shall hereafter become necessary," thereby repealing the 5th section of ch. 73, in express terms.

The object and effect of the Act, 35 Vic., ch. 16, seems to me to be to *extend* to all married women the benefit, as to wages and other things named in the 2nd section, which ch. 73 had conferred only upon the particular classes in the 6th section of the Act enumerated. The enumeration of the several items in the case pointed out by the Chief Justice, namely, firstly, all the wages, &c.; secondly, and all proceeds or profits from any occupation or trade which she *carries on separately from her husband*, as well as the whole bearing of the Act, seems to me to support this view as the true construction of the statute.

GALT, J., concurred.

Rule discharged.

THE QUEEN V. CRONAN.

Indictment for shooting with intent—Conviction of assault—Evidence.

Upon an indictment for shooting with a felonious intent, the prisoner, if acquitted of the felony, may be convicted of common assault.

To discharge a pistol loaded with powder and wadding at a person within such a distance that he might have been hit, is an assault. It was *held* here that there was sufficient evidence of the prisoner having done this, and a conviction for assault was upheld.

THIS was a case reserved by A. N. Richards, Q. C., sitting for Richards, C. J., at the last April sittings of the Court of Oyer and Terminer, at Barrie.

The indictment charged the prisoner with shooting, in the first count, with intent to maim; and, in the second count, with intent to disable.

The prisoner pleaded not guilty.

The evidence was as follows:

The prosecutor stated that on the 8th of February last, some goods of the prisoner were placed in his charge by a constable, in a cook house attached to his house. On the 8th of April, about 10 a. m., the prisoner called at his house, and in the presence of his wife threatened to burn the goods before he would allow them to be sold. About 11 o'clock that night, he again came attended by a large number of persons, and commenced tearing down the cook house; and on the prosecutor going out and telling him that unless he desisted he would split him with an axe, the prisoner drew up his hand and presenting a pistol or revolver fired two shots at him. The prisoner and those with him then drove the prosecutor into the house, pulled down the cook house, and took the goods away. He identified the prisoner, and stated that he saw the flash and heard the report, and was quite certain that it was a pistol or revolver, but could not swear to it. He also said that he was not at all frightened when the prisoner fired at him, but told him to fire away, and that neither of the shots hit him.

Other witnesses corroborated the prosecutor.

On the part of the prisoner, some witnesses were called, who stated that the report sounded like that of a fire cracker.

The learned Queen's counsel told the jury that they might, upon the indictment, find the prisoner guilty of common assault; and the jury so found.

The learned Queen's Counsel, at the request of the counsel for the prisoner, stayed judgment, and reserved a case for the opinion of this Court, as to whether there was sufficient evidence to go to the jury of a common assault.

In this term the case was set down for argument.

McCarthy, Q. C., for the prisoner. There cannot be a conviction for common assault on an indictment charging the prisoner with shooting with intent, on his acquittal of the principal charge. At all events, there was no evidence of assault here to go to the jury. It must be clearly proved that the weapon is loaded with a ball, bullet, slug, &c. and not with powder only, as here; and it must also be proved that the prisoner was within such a distance as to do harm. In order to constitute a criminal assault, there must be a present ability to do injury. The mere fact of pointing an unloaded weapon at a person, is no offence; *Russell* on Crimes, 4th ed., vol. i., p. 978; *Regina v. Oxford*, 9 C. & P. 525; *Blake v. Barnard*, 9 C. & P. 626; *Regina v. James*, 1 C. & K. 530; *Regina v. St. George*, 9 C. & P. 483; *Regina v. Baker*, 1 C. & K. 254. The Act 32-33 Vic. ch. 20, sec. 18, D., clearly shews that there must be a ball shot, slug, &c., in the barrel.

J. G. Scott, for the Crown, contra. There can be no doubt that a prisoner may be found guilty of common assault on an indictment charging him with shooting with intent, as here. As to whether there was evidence to go to the jury, the Court are not to decide as to what verdict the jury should have given, but whether there was any evidence, that is, any reasonable evidence, to go to them. The evidence of the prosecutor shews that he saw the flame and thought the pistol was loaded. In *Regina v.*

Oxford, 9 C. & P. 525, it is said that there is no strict rule as to proving whether the weapon is loaded, but it may be proved by shewing that the whizzing of the ball was heard, &c. It is not, however, necessary to prove that the pistol is loaded with ball, as long as it is proved that the prisoner was near enough to do bodily harm, and that there is an intent to do so ; in such a case it is quite sufficient to prove that the weapon is loaded with powder and paper only ; and in every case, it is a matter for the jury to decide : *Rex v. Kitchen*, R. & R. 95.

GWYNNE, J., delivered the judgment of the Court.

The only point reserved for our opinion is, whether a verdict of common assault could be rendered upon an indictment charging a shooting at a person with a felonious intent, if the prisoner be acquitted of the felony ; and whether there was any evidence which could be submitted to the jury to support a verdict of assault.

There can be no doubt that upon such an indictment a verdict for common assault may be rendered, if the prisoner be acquitted of the felony.

To discharge a pistol loaded with powder and wadding at a person within such a distance as that the party might have been hit, is an assault, and there was evidence sufficient to go to the jury upon that point.

The point of the objection seems rather to be that there was not sufficient evidence to warrant the conclusion the jury have arrived at, than that there was no evidence ; but upon that point the prisoner's counsel had the benefit of addressing the jury, and it is one, moreover, with which we have nothing to do, in the determination of the case submitted to us.

If the charge had been of shooting at the prosecutor with intent to disfigure or to do some grievous bodily harm, and if the jury should have been of the opinion that the pistol was discharged so near to the person that if the wadding had struck him it might have disfigured him, or have done him grievous bodily harm, and that it

was discharged with either of the above intents, the charge of felony might have been sustained, although the pistol was not loaded with ball: *Rex v. Kitchen*, R. & R. 95. It would be different if the act complained of was the pointing at a person a pistol which was in such a condition as to be incapable of being discharged, which latter is no assault, as held by Tindall, C. J., in the case referred to, *Regina v. James*, 1 C. & K. 530.

We are of opinion that there was sufficient evidence to go to the jury, and that the conviction must be upheld.

Conviction affirmed.

LEE V. BOTHWELL.

Building contract—Joint or several—Separate contracts by different tradesmen—Delay.

The specifications for a dwelling house to be built stated the work to be done under different heads, mason, carpenter, &c.; and contained a condition that the building must be completed by the 15th June, under a penalty of \$20 per week as liquidated damages.

The contract, based upon separate tenders by the different tradesmen signing it, was as follows: We the undersigned hereby agree to build, erect, complete, and finish the dwelling house, &c., mentioned in the foregoing specifications, for the respective sums hereinafter specified by the time mentioned in the condition of said specifications, and according to the following trades. The trades with the contract price for each were then set out, a space being left after each for the respective contractors to sign their names; and the plaintiff thus contracted for the carpenter and joiner's work.

Held, a several contract between each tradesman and the defendant, not a joint contract with all.

Held, also that there was an implied contract by defendant with each contractor that he should not be wrongfully or unreasonably delayed in carrying out his contract; but that where the brick work was necessarily delayed by reason of the frost, and the plaintiff's work was thereby impeded defendant was not responsible.

DECLARATION. First count: on an implied contract of the defendant, arising out of a contract for the carpenter and joiner's work alone, setting out the contract and specifications, which plaintiff contracted to do for the

defendant; and that in consideration of the plaintiff having so agreed, the defendant promised the plaintiff to permit him to do and complete the said work on the terms of the said contract, and not to hinder, prevent, or delay the plaintiff in proceeding with the performance of the said work; and that the plaintiff did accordingly commence, and in part perform the said work on the terms aforesaid, and was always ready and willing to do and complete the whole of the said work, according to the said agreement, whereof the defendant always had notice; and that all conditions were performed, &c., to entitle the plaintiff to a performance of defendant's promise: yet the defendant wrongfully hindered, delayed, and prevented the plaintiff for a long time from proceeding with and completing the said work, whereby, &c., the plaintiff was damnified.

Second count: for a balance claimed to be due for the work, alleging it to have been performed according to the contract.

The common indebitatus counts for work and labour, and materials were added.

Pleas. To the first count. 1. *Non assumpsit*. 2. That defendant did not hinder, delay, or prevent the plaintiff from proceeding with the work, as alleged. 3. A special plea, alleging that, by mutual agreement between the plaintiff and the architect of the defendant, with the consent of the defendant, owing to the severity and unsuitableness of the weather for building purposes, the said work was suspended by the mutual consent of the plaintiff and the said architect of the defendant, from, to wit, the month of November, 1871, until the month of March, 1872; and that the plaintiff was not hindered, prevented, or delayed from proceeding with the work, except during the said time that it was mutually agreed between the plaintiff and the defendant's architect that the said work should be suspended. On these pleas issue was joined.

The issues upon the other pleas are immaterial to the present enquiry, as a verdict was rendered for the defend-

ant on the second count; and although the jury gave a verdict for the plaintiff for \$52.40. on the third count, which was endorsed upon the record, yet it appeared by the notes of the learned Judge to have been admitted by the plaintiff's counsel, that in view of the matters for which the \$52.40 was allowed, as stated by the jury, the verdict upon that count should be entered for the defendant also. The whole question was upon the first count.

The cause was tried before Wilson, J., and a jury, at Toronto, at the Winter Assizes of 1874.

From the evidence given at the trial it appeared that the defendant, being about to erect a house in the City of Toronto, employed an architect to prepare specifications, and to obtain tenders for all the works necessary to complete the house, and also to prepare and have executed the necessary contracts for that purpose.

The architect accordingly prepared the specifications entitled :

"Specifications of work and particulars of the materials required to be used in the erection of a villa on Jarvis street, Toronto, for R. C. Bothwell, Esquire."

Then followed a particular description of the several works required to be done in the erection of the house, under the heads—"Excavator," "Mason," "Bricklayer," "Carpenter and Joiner," "Slater," "Tinsmith," "Plumber," "Bell-hanger," "Ironworker," "Plasterer," and "Painter and Glazier."

The specifications concluded with certain "concluding conditions," among which were the following :

"Everything is to be provided to make the entire building and work complete, without any extra charge; and the whole is to be executed in a good, sound, and tradesman-like manner, subject to the approval of the architect, who shall be the sole judge of the work, and of its correspondence with the drawings and specifications.

"Every part of the work required to be done to render the intended building complete, (though omitted in the specifications), must be taken into account by the con-

tractor or contractors, and executed by him or them in a good, sound, and tradesmanlike manner for the sum stated in the tenders.

“The building and other work must be completed and handed over to the proprietor by the 15th day of June 1872, under a penalty of twenty dollars a week as liquidated damages for any delay after that period, and which amount is to be deducted *pro ratâ* from any contractor or contractors who may be the cause of the delay in the completion of the building.”

Separate tenders were accepted for the several works.

Afterwards the architect prepared a contract to be executed by the tradesmen whose tenders had been accepted, which was as follows :

“We, the undersigned, hereby engage to build, erect, complete, and finish the dwelling-house on Jarvis street, Toronto, mentioned in the foregoing specifications, and more fully described in the drawings thereof, according to the conditions therein mentioned for the respective sums hereunder specified, by the time mentioned in the concluding condition of the said specifications, and according to the following trades :

William James Hughes, for the excavator, mason, and bricklayer's work, for the sum of \$1,800.

A space was left here for Hughes to sign.

William Augustus Lee, for the carpenter and joiner's work, for the sum of \$2,460.

A space was, in like manner, left for Lee to sign.

George Duthie, for the plasterer's work, for the sum of \$222.

A space was likewise left for Duthie to sign.

And so likewise, for the tinsmith's work, the plumber's work, the plasterer's work, and the painter and glazier's work, all separately.

This contract, so prepared for execution, was attached to the specifications, with one sheet of blank paper separating the specifications from the contract.

The contract was produced, and appeared to have been

signed by William James Hughes for the excavator, mason, and bricklayer's work, at the place at the foot of the contract provided for his signature. This signature appeared to bear date November 1st, 1871.

It also appeared to be signed by the plaintiff, and by five other contractors, at the respective places provided at the foot of the contract for the signatures of the persons contracting for the several works, of carpenter and joiner, slater, tinsmith, plumber, plasterer, and painter and glazier.

William James Hughes was called as a witness by the plaintiff, and stated "that he contracted for the mason and brickwork, and began it in the fall of 1871; that he did not work at it in the winter, because the frost set in early in November, and interfered all the winter: that he could not make a good job of the work in the winter: that he talked of this to the defendant, and gave him to understand that it could not be a good job if done in frosty weather: that the defendant wanted witness to go on in the winter, if he could: that the defendant was not particularly or urgently anxious that witness should stop the work; that witness explained to the defendant that he (witness) could not do the work, and that the defendant replied, that if witness *could not*, he might let it stand until the spring, and that accordingly witness did let it stand until the end of March.

In cross-examination, he said, that from the severity of the weather he could not go on with the brickwork; that the work could not have been done, because the weather was so severe.

On re-examination, he said, that the work might have been done in winter months, but the men would have wanted stoves on the scaffold, and then it would not have been a good job, and would have cost more.

The plaintiff being examined upon his own behalf, said, that Paull, (the defendant's architect), came to him about the 23rd of October, and asked him to tender for the work, that it would be a winter's job, and that the brickwork would be done about the 1st. of January, and that the first two frames for the bricklayer to go on with his work were

set up ; that it then began to freeze, and witness then called on Paull, and asked him why the work was not going on. Witness said that Paull told him that Hughes had asked the defendant if he wanted a good job, and the defendant said yes ; that Hughes then said that he could not do it in that weather, and that it would have to stand until spring. The plaintiff said that he thereupon asked Paull to release him from his contract, but Paull said he could not do it; that plaintiff said he feared the price of lumber would rise, and that he had been notified by the carpenters' society, that after the 1st of May there would be an advance of wages. Paull said he regretted that, but that the thing was settled; and that he then sat down in his office and wrote the following letter, addressed to the plaintiff :

“TORONTO, Dec. 1st., 1871.

“DEAR SIR :

“As the building of the brickwork of Mr. Bothwell's house was intended to be done before Christmas, so that the carpenters' work might be got on with during the winter, and by reason of the frost it cannot be proceeded with safely, I will recommend Mr. Bothwell to make an advance to you on the amount of the contract price of \$2,460, of \$100, and if Mr. Bothwell will not make this advance, I will give you an order for the amount of the same on Mr. Bothwell, to be paid by him out of my commission, before the work is finished. If, however, the brickwork can be got on with, and completed before the end of January, 1872, this note to have no force.

“I remain, dear sir,

“Yours, truly,”

(Signed)

“A. E. PAULL.”

“MR. WM. A. LEE.”

The plaintiff proceeded to say that, upon writing this letter Paull handed it to him, saying: “See what I can do for you;” that plaintiff then said to Paull: “If you will not release me, will you let me go on with the work in the winter, and pay me 80 per cent. on the work, as on the contract?” that Paull said he was satisfied, and plaintiff thought he said he would see the defendant.

The plaintiff himself saw the defendant that same day. He was willing that plaintiff should go on with the work,

but he did not agree or disagree to pay the 80 per cent. The defendant wanted the work done. The plaintiff told him it would be a better job. The plaintiff then handed the defendant the certificate for \$320.50 for the work then already done; the defendant said he did not think it was usual to pay for work before it was in its place, but that he would see about it; he did see Mr. Paull, and afterwards gave plaintiff a cheque for the amount of the certificate, but he wanted plaintiff to insure the stuff on the ground and in the building, which plaintiff did before the defendant gave him the cheque.

The plaintiff further said, that in that conversation the defendant led him to believe that Hughes had said he could not give a good job if the brickwork went on, and that he (defendant) wanted a good job.

The plaintiff further said, that he (plaintiff) understood the work could not be done in the winter, because it was brick pointed: that plaintiff, himself, thought that perhaps plain brickwork could have been done in the winter. He (plaintiff) then went on with the work in the spring, about a day or two after the mason, Hughes, commenced again; and witness, for extra wages and extra cost of lumber, &c., made a charge of \$436.50, for damages sustained by him by reason of the alleged hindrance, which was the cause of action stated in the first count.

The plaintiff further stated, that after the work was completed, together with certain extra work, Mr. Paull awarded as due to plaintiff \$265.81, which sum, together with \$100, mentioned in Paull's letter of December 1st, and a further sum of about \$60, in all \$425, the defendant offered to pay to the plaintiff, but he would not accept it. The defendant claimed he had paid this sum, by \$325 paid into court, and by setting off a note of plaintiff's for \$100, which note the plaintiff admitted to be due, for the balance. The plaintiff said that he never told the defendant that he would not go on under the contract; that defendant did not keep the 20 per cent. from him.

At the close of the plaintiff's case the counsel for the defendant objected that there was no evidence to go to the

jury upon the first count, upon the grounds—1. That the contract was by the plaintiff and the other workmen jointly, and that the plaintiff could not sue alone upon it for any delay, if there was any. 2. That the delay was that of the bricklayer, a party executing the contract with the plaintiff; and that the plaintiff should look to him, and not to the defendant. 3. That the evidence shewed no hindrance for which defendant was liable.

The learned Judge overruled the objections, but reserved leave to the defendant to move to enter a nonsuit, and the case proceeded.

The defendant was examined. He gave his account of the matter as follows: "Hughes, the bricklayer, came into my store on the 3rd of November, 1871. He told me he could not proceed with the building, as the frost was so severe. I told him I had nothing to do with it, to go to the architect. He said he had been at his office, but could not see him. He asked me if he should stop the work. I said I could not say; that he had to go to the architect. I said I did not want the work stopped; that I wanted him to proceed. He said he could not do it, the frost was so severe. He said he could not make a job of it. He asked me what I should do. I said I would not take any but a first-class job, as he had got his price for such a job. He asked me what he was to do, as he could not make it a first-class job. I said, if it is impossible to build it, I suppose you will have to let it alone; but I did not tell him to do so. He said he would see the architect about it."

The architect being called, said: "That on the 3rd of November, 1871, the plaintiff signed the specifications on a blank sheet at the end of the specifications, (at this time the contract, as it now stands, was not drawn out). He afterwards signed the contract, on the 1st. of December, 1871. This was after Hughes had stopped his work. The plaintiff, on that day, called on me, and said that Mr. Hughes and defendant had stopped the work. I was surprised, as I had heard nothing of it. I said I supposed it was in consequence of the frost; but I did not think the

defendant would take any active part without first consulting me, and I said I would see him. The plaintiff was disappointed at the work being stopped, as he said it would make a difference to him between working in the winter and in the spring, and that if the work could be got on with, it should be. The plaintiff promised to see me next day. I think I said to plaintiff he had signed the contract at the end of the specifications; but I had made a different conclusion at the end of the contract, so that each contractor would have a separate contract, and I asked him to sign it. He objected. I asked why. He said as the work was stopped, he would not sign it. I said, at all events, it could make no difference, that he ought to sign the contract, as if the stoppage had not happened. The plaintiff said he would be likely to lose by the rise of labour, and unless some extra remuneration was made to him, he would not sign. I asked him what loss he would be likely to sustain by the rise of labor. He said, at least \$150. I said it could not be so much. I said I would advise defendant to give him \$100 extra. The plaintiff was unwilling to sign then, unless a definite arrangement was made as to what he was to get. I then wrote my letter", (of the 1st December). "I presented the letter to the plaintiff, and asked him if that would suit his purpose, if that was satisfactory, and he received it as being satisfactory. I then said, You will be kind enough to sign the contract where the other contractors have signed. I say, most distinctly, the contract was signed by the plaintiff, after I had handed the letter to him."

The witness also stated that he received a letter from Hughes, of December 2nd, 1871. He said he (Hughes) would stop the work, from the frost, and he would resume it in the spring.

The witness gave more testimony relative to the signing of the contract by the plaintiff on the 1st December, and to his, witness's, letter of that date; but it is unnecessary to set it out in full.

At the close of the case the defendant's counsel renewed his objections to the plaintiff's right to recover. The

learned Judge overruled the objections, but reserved leave to defendant to move to enter a nonsuit.

The learned Judge told the jury that the contract was several as to each contractor, and that if one contractor delayed another the defendant's liability to the delayed contractor was just the same as if the contracts had all been drawn on separate papers with each contractor.

He also told the jury that there was evidence that the defendant had given time to the bricklayer, and so had delayed the plaintiff against his will. He said that even if defendant had not given time to the bricklayer, or had not assented to the delay, he would still be liable, because the plaintiff was entitled to be put in possession of the work by the defendant; but he told the jury that if the plaintiff had agreed to take the \$100 offered by the architect by the letter of the 1st December, 1871, in satisfaction of all claim for extra wages, nothing should be allowed to the plaintiff upon that item.

The jury found a verdict for the plaintiff for \$200, on the first count, but it did not clearly appear what view they took of the architect's letter, agreeing to give \$100 to cover excess in price of labor; for the plaintiff's claim for that item, and for the advance in the price of materials, was \$437.50, for which it appeared the jury allowed him only \$200.

In Hilary Term *M. C. Cameron*, Q. C., obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a verdict for the defendant, pursuant to the leave reserved, or for a new trial on the law and evidence, and for misdirection.

In the same term, *Harrison*, Q. C., shewed cause. The evidence shews that the plaintiff never would have entered into the contract had he known that he would have had to wait until spring, as his whole intention was to do the work in the winter, when labour and materials were cheap, but by defendant giving time to the bricklayer until the spring, as the plaintiff's work was contingent on that

of the bricklayer, he was delayed until then, when labour had risen. As the defendant caused the delay by giving time to the bricklayer, he is liable: *Roberts v. Bury Commissioners*, L. R. 4 C. P. 755, L. R. 5 C. P. 310; *Holme v. Guppy*, 3 M. & W. 387; *McDonald v. Canada Southern R. W. Co.*, 33 U. C. R. 313; *Ludlow v. McCrea*, 1 Wend. 228; *Papps v. Melville*, 16 U. C. R., 124. The defendant, however, contended that the contracts were all joint contracts, and therefore the plaintiff could not sue alone, and, at all events, that the bricklayer, and not the defendant, was liable; but the language of the contract, as well as the circumstances under which it was executed, and the fact of their being no community of interest, clearly shews that the contracts are several and not joint. Even were the word joint used, as there is no community of interest the contracts would still be several. The defendant is severally liable to each contractor for any delay caused by him: *Corporation of Essex v. Bullock*, 11 C. P. 323; *Haddon v. Ayers*, 1 E. & E. 148; *Keightley v. Watson*, 3 Ex. 716.

M. C. Cameron, Q. C., contra. The architect's evidence shews that the plaintiff did not sign the contract until after the work was stopped, and it was for this reason that he at first refused; but on the architect writing that he would advise the payment of \$100 for the delay, and on his undertaking to see it paid, the plaintiff signed the contract, and accepted this amount in satisfaction of his loss. The defendant never gave time to or interfered with the bricklayer. All that he said was that the work must be properly done, and if it could not be done in the winter on account of the severity of the weather, he supposed he would have to wait till the Spring. His act simply amounted to saying that he would not sue. The plaintiff, however, as appears from his own evidence, knew that on account of the severity of the weather the work could not be done, and particularly, as it was pointed work. The bricklayer had a reasonable time to do the work, and as the delay was caused by the severity of the weather, there can be no liability. The next point is, that the contract was

a joint, and not a several contract. The language used "we," &c., shews it is a joint contract. It is a joint contract by all the contractors to do the work by a particular time named, and for an aggregate sum. It is also a separate contract for each to do his particular work by the time named, each guaranteeing the work of the other. Moreover, as the delay was that of the bricklayer, the action should have been against him, and not against the defendant: *Mansell v. Burredge*, 7 T. R. 352; *Yates et al. v. Law*, 25 U. C. R. 562; *Sorsbie v. Park*, 12 M. & W. 156; *Bradburne v. Botfield*, 14 M. & W. 559; *Keightley v. Watson*, 3 Ex. 716; *Fell v. Goslin*, 7 Ex. 185; *Hopkinson v. Lee*, 6 Q. B. 964.

HAGARTY, C. J.—I think we must regard the position of the parties in this light. The contract is several as regards the individual right to sue, but we cannot overlook its real nature.

We, A., the mason, and B., the carpenter, agree with C., the plaintiff, as follows: I, the mason, will do all the stone and brick-work of your house; and I, the carpenter, will do the wood-work of your house, each by a day named. The law adds this term: I, the defendant, will undertake not to delay or impede you, or either of you, in your respective work.

If the mason cannot, from a cause over which none have a control, proceed with the brick-work, so as to make it a reasonably good job, he cannot have the place ready for the carpenter's work, and the latter is thus delayed.

I am unable to see how the defendant, the employer, can guarantee the carpenter against such a contingency.

I have no doubt the carpenter could urge this state of things, and successfully, in his defence, if sued for not completing his work by the day named.

I think the defendant has the right to say that he has not been guilty of any default in his implied contract.

GWYNNE, J.—I entertain no doubt that the contracts contained in the instrument are several contracts between

the respective tradesmen executing it and the defendant. The interests are quite distinct, and the language, as well as the circumstances attending the execution, each party tendering separately, shews very clearly the intention of the parties to be that the contracts should be several: *Haddon v. Ayers*, 1 E. & E. 148; *Corporation of Essex v. Bullock*, 11 C. P. 323; *Keightley v. Watson*, 3 Ex. 722.

The contract appears to me to be a sort of cooperative contract, wherein each tradesman for himself contracts that, in so far as depends upon him, the work contracted to be done by him shall be done in such time that the whole work, namely, the completed house, may be finished by the time named, namely, the 5th of June, 1872, not a joint contract by all that the work shall be finished by that time, nor a separate contract by any one that his particular work shall be finished by that time.

I am of opinion, also, that upon the authority of *Yates et al. v. Law*, 25 U. C. R. 562, an implied contract arises between the defendant and each contractor separately, that he shall not be wrongfully or unreasonably delayed in the carrying out of his contract; but this, I think, is the extent of the implied undertaking. Each contractor is subject to the reasonable control of the defendant as to the order in which the work shall be gone on with, and to a reasonable extent as to the time, according to the seasons or otherwise: *Lake v. Cameron*, 18 U. C. R. 622.

Now, the defendant was entitled to have a good job, such as he had contracted for, executed, which the evidence of Hughes seems to establish he could not have had by reason of the severity of the frost, if the work had been proceeded with. I gather, indeed, from the plaintiff's own evidence, that the work required, being brick pointed, could not advantageously have been done in the winter, although plain brick work might have been; but the defendant was entitled to have the work he contracted for executed in the best and most workmanlike and proper manner, and if the frost was so severe that he could not have the work which he contracted for executed in a proper manner, if

done during the winter, any delay arising by reason of the frost was reasonable, and did not impose any liability upon the defendant, whether he consented or not to the delay.

I think, therefore, that there has been a miscarriage in the manner in which the first count was left to the jury, and that there should, therefore, be a new trial, and that the jury should be told that if the delay of Hughes was reasonable, having regard to the work he had contracted to perform and to the state of the weather, as to which there seems to be no contradiction in the evidence, the defendant is not liable, and that their verdict should be for him in such case.

There must therefore be a new trial upon the first count.

GALT, J., concurred.

Rule absolute.

DRAPER V. HOLBORN.

Contract for lease—Rent to be paid by clearing—Eviction—Right to recover for work done.

Where, under a parol agreement for a lease, made between defendant and plaintiff for ten years, on the terms of the plaintiff clearing, or paying a rental either in clearing or in money, the plaintiff entered into possession, and after clearing a certain number of acres, the defendant sold the lot, and the purchaser ejected the plaintiff. Held, that the plaintiff could not recover under the agreement, not being in writing; nor under the common counts for the value of his services, for the clearing of the land, was not the primary service for which the lease was, after the performance of the work, to be given as a mode of compensation; but the lease was the primary thing contracted for, and the work was reserved as a rent from year to year.

Seemle, that the plaintiff's remedy, if any, was for specific performance of the agreement against the purchaser, who had purchased with notice of the plaintiff being in possession.

Seemle, per Hagarty, C. J., that if the bargain had been for work to be done by plaintiff in clearing the land, to be paid for by allowing him to occupy, and defendant had prevented the occupation, the plaintiff might have recovered the value of the work.

DECLARATION: 1. That the defendant agreed with the plaintiff that if the plaintiff should clear and fence certain

lands, he should be allowed to occupy all land so cleared for ten years; and although the defendant permitted the plaintiff to occupy for three years, he did not allow him to occupy for the residue of the time, whereby the plaintiff has lost the use of the land and his labour.

Common counts.

Pleas. To first count: non assumpsit. To common counts: never indebted. Issue.

The cause was tried before Hagarty, C. J., and a jury, at Toronto, at the Spring Assizes of 1874.

It appeared that the defendant owned lot number 4, in the 4th concession of the township of North Gwillimbury, containing about 177 acres, and had demised the west half to one Hover, and the south half to one Young, for terms of ten years, upon clearing leases: that is to say, the tenants to clear and fence three acres in each and every year of the term, or pay \$30 a year rent.

In 1869 the plaintiff wished to obtain from the defendant a like lease of part of the same lot; and some negotiations took place between them with that view. The account given by the plaintiff was that the defendant told him to go on and clear, and that he, the defendant, would stand between him, the plaintiff, and harm; and that upon the plaintiff replying that the tenants might not want him to go on, the defendant gave him a letter to take to the tenants, upon seeing which, he said, they would let him go on. The plaintiff accordingly went to Young, who refused to let him go on his half; but Hover said that he might go on his half, the north half, as the land was of no use to him. After Young refused to let the plaintiff go upon his half, the defendant wrote to the plaintiff a letter dated the 24th December, 1869, which was as follows:

“ Mr. Draper,

“ Sir,

“ Mr. Young knows that I have the right to let you or any other person clear the rest of the lot west of the thirty acres he has to clear; John Hover the same. It is not in the lease, but that was the understanding. If Mr. Young sticks to the lease, I will have to do the same.

I agreed with Mr. Draper and Mr. Sweet to clear the rest of the lot west of theirs. If Mr. Young will not let any one go on, I shall expect him to clear or pay the damage. There is betwixt twenty and thirty acres west of Hover's you might clear. If Hover sells his right, I shall expect the party to fulfil the lease. Mr. Draper knows the terms I said I would let him have it on the front. Please let Andrew Young see this letter. I hope Mr. Young will consider, and do that which is just and right.

"Yours truly,
(Signed) "THOMAS HOLBORN."

This letter was delivered to the plaintiff, to whom it was addressed.

The plaintiff said that Hover having consented to his clearing on the north half, he accordingly did so, and that he cleared fifteen acres, which he had for three years, when the defendant sold the lot, subject to the leases to Young and Hover, to one Deverill, who served the plaintiff with the following notice:—

"April 26, 1873.

"Mr. Draper,
"Dear Sir,

"As I have purchased lot number 4, in the 4th concession of North Gwillimbury, and I am informed that you profess to have a claim on the said lot, of about fifteen acres, on the north hundred of the said lot, I hereby forbid you trespassing on the said lot, without my consent or order.

"Yours truly,
(Signed) "WM. DEVERILL."

The plaintiff thereupon brought this action, seeking pecuniary compensation for not having the lease for the residue of the ten years, as he says was agreed upon.

One *Smith*, who was called as a witness by the plaintiff, said that he was present when the plaintiff and the defendant were bargaining: that "it appeared that the defendant had given a lease to another man, and if the tenant would let him go on to clear he was to have the use of the land. He was to have whatever land he cleared up for ten years. The defendant went on and cleared fifteen acres. Hover and

Young then had the lot, Hover the north half, and Young the south half. The plaintiff wanted the land on the same terms as they had it. He was to have the land for ten years. He was to clear fifteen acres, but did not say when. The clearance was to be the rent. The defendant wrote a letter to the tenants. He said to the plaintiff that he would guarantee they would let him on. The plaintiff said he would take it for ten years on same terms as Hover and Young, but as three years of their leases were gone, he would have it three years beyond their time, ten years in all; that defendant replied that if the tenants would let plaintiff go on, he would guarantee him he should have it for ten years. He was to lease the west part. He was to lease first what he cleared for ten years."

The plaintiff's son, who was also called as a witness, said that he was present when the bargain was made: that it was made at Smith's; that the defendant told the plaintiff to go on and clear, and that he should have the use of it for ten years. Hover and Young were in possession under leases. The plaintiff said perhaps they would not let him go on. The defendant said he would give his father a letter, which he was to give to Hover and Young. The defendant gave him a letter. This was in December, 1869. Young would not let them go on his part, but Hover allowed them to go on.

The defendant, being sworn on his own behalf, produced the leases to Hover and Young, for the north and south halves respectively, dated the first of April, 1867, for ten years, rendering the yearly rent of \$30, or to clear and fence three acres in each and every year during the term, to be fenced in five six acre fields, at the end of the term.

The defendant said that Hover and Young did not clear as agreed, and that the plaintiff proposed to go on and clear upon the same conditions that they were in upon: that defendant told him he could not give any writings: that if they would give up part of the land, the defendant would give the plaintiff writings: that the plaintiff never asked him for writings: that he supposed plaintiff to be under Hover's

lease: that he went to Hover for rent, and that he said that he and the plaintiff had done enough clearing or nearly so to satisfy the lease. No one performed the terms of the leases. He said that he told the plaintiff that if the tenants would give up any part, he, the defendant, would arrange with the plaintiff, but not unless he could arrange with the tenants. The defendant sold to Deverill, subject to the leases of the first of April, 1867.

Deverill was also called, and said that he bought the place, subject to the two leases to Young and Hover. Before his purchase he saw the tenants, but did not see the plaintiff, but he heard from the tenants of his being on the place, and he insisted upon an abatement of \$420, by reason of the leases.

After his purchase he saw the plaintiff and told him that he, Deverill, had purchased, whereupon the plaintiff told him that he had possession and had sowed a part. To which Deverill replied that he did not care so as the leases were carried out by the tenants, or by him. He said that he bought Hover out a few days before he saw the plaintiff; that Hover claimed those fifteen acres as his; that when he, Deverill, saw the plaintiff on the place the plaintiff did not assert under whom he was there, namely, whether under the defendant or Hover. The plaintiff's clearance was twenty or thirty rods from Hover's. The plaintiff did not tell Deverill, that he, plaintiff, was to stay there for ten years. Hover had told Deverill that the plaintiff had cleared the fifteen acres to help him Hover to clear, and Deverill told Hover that if these fifteen acres were his he would give him \$50 for them, but he did not pay him the amount because he feared that he, Hover, had made some agreement with the plaintiff, and shortly after Hover cleared out.

On the 16th or 17th of May, about three weeks after Deverill's first interview with the plaintiff, he saw him again, when the plaintiff asked him to let him, the plaintiff, stay on the place under the old agreement—that is to say, as Deverill understood, under the leases; to which Deverill re-

plied that he would not do so, unless the plaintiff came under him, Deverill, which plaintiff said he would not do; there-upon Deverill said that he would take possession, to which the plaintiff replied that he would have nothing to do with it, and then Deverill took possession.

It was objected for the defendant that there could be no recovery for work and labour; that, as to the special count, the bargain was void under the Statute of Frauds, and no action lay on it.

The plaintiff insisted that as the consideration on which the plaintiff cleared the fifteen acres failed, he was entitled to be paid on a *quantum meruit*.

Leave was reserved to move to enter a nonsuit.

It was left to the jury to find whether the bargain was absolutely to give the land to the plaintiff for ten years, for clearing it, as he asserted; or whether it was only given conditionally, if the plaintiff could arrange with the tenants, so that if he arranged with them he could enter and clear as they did; and to assess the value of the work done in clearing.

The jury found for the plaintiff, with \$200 damages.

In this term *Harrison*, Q. C., obtained a rule *nisi* on the leave reserved, or for a new trial on the law, evidence, and weight of evidence.

In the same term *M. C. Cameron*, Q. C., shewed cause. The plaintiff does not rely on the first count, but he is clearly entitled to recover the value of his services under the common counts. The contract was, that if the plaintiff would clear and fence the land, the defendant would give him a lease for ten years, and the defendant, after the plaintiff had gone on the land and performed his part of the contract, puts an end to the contract. The law is clearly laid down that where the special contract is put an end to, and the employer has derived some benefit from the work done under it, he is liable upon an implied promise to make reasonable remuneration in respect thereof: *Add. on Contracts*, 6th ed., 23; *Inchbald v. Western Neil-*

gherry Coffee Co., 17 C. B. N. S. 733; *Bartholomew v. Markwick*, 15 C. B. N. S. 711.

Harrison, Q. C., contra. The plaintiff cannot recover on the special contract, as the evidence shews that there was no such agreement as the plaintiff contends; at all events it is void by the Statute of Frauds. As to the common counts, he clearly cannot recover the value of his services. It is laid down, that where a person promises to lease land to another, who pays a certain sum down, and goes into possession, and default is made in giving the lease, he cannot rescind the contract and recover the money paid under the common counts; or where a person enters into a written agreement for the purchase of land, and pays down a deposit, and is placed in possession, and the purchase afterwards fails, he cannot sue under the common counts for his deposit. The same rule would apply to work and labour: *Blackburn v. Smith*, 2 Ex. 783; *Hunt v. Silk*, 5 East 449; *Beed v. Blandford*, 12 Y. & J. 278; *Wright v. Stavert*, 2 E. & E. 721.

HAGARTY, C. J.—The circumstances of this case are peculiar. The contract cannot be enforced, not being in writing.

The plaintiff was not bound to clear any land, it was wholly optional with him to do so or not; but he says the defendant promised that whatever he did clear, he was to enjoy for ten years.

It would seem from the evidence, that but for the sale to Deverill the plaintiff would have probably enjoyed his clearance for the stipulated term, for he had no interruption from Young or Hover.

It is quite true that payment in money for the work of clearing was not in the contemplation of the parties. That however has not always prevented the subsequent implication by law of a contract to pay.

Martin, B., in *Harrison v. James*, 7 H. & N. 804, says, at page 808, "I can well understand that if a person agree to build a house upon the land of another for a certain

sum, to be paid by instalments, if the owner of the land absolutely prohibits the builder from completing the house, he would be entitled to recover compensation for what he had done, because it was agreed that he should be paid in a particular way and the other party prevented him from earning the money in that way. So if a person is let into possession of land under a proposed lease, I can well understand how he is bound to pay for the occupation of the land."

I presume if a man verbally agreed to let another have his house for five years, paying no rent, on condition of the tenants spending so much a year in improvements, if the tenant occupied, say four years, and left refusing to do any of the improvements, the owner could recover from him for reasonable use and occupation, though the payment of rent was no part of the express bargain.

So, in further illustration of Baron Martin's view, if A. verbally agree with B. that the latter shall build a house on A.'s land, in consideration of which it is agreed that B. may have the house and sufficient ground for ten years; and B. builds the house, but A. refuses to allow him to occupy, I think he might then recover the value of the work.

If he were ejected after three years' occupation, it may be that he could still recover, less the value of his occupation.

But can we on the evidence view the case in this aspect? I fear not. It rather seems, as my brother Gwynne puts it, that the contract was not to clear land to be paid for by permission to occupy, but a contract to get a lease like the other tenants—a contract for a term, on terms of clearing, or paying a rental either in clearing or in money.

In fact, as the first witness, Smith, described it, "The defendant told me that the plaintiff was coming to him to take land to clear," and the bargain was, "that the plaintiff was to have the land for ten years." This was when the plaintiff and the defendant were together before Smith.

The plaintiff says, "I was to clear land on the west end, any quantity I had a mind to clear, and if I cleared I was

to have the use of it for ten years." The various discussions about the apprehended dissent or interference of the existing tenants, all point to an interruption of the term, not to a mere preventing of the performance of work to be done by one man for another.

If it were a contract for work merely, to be paid for in a particular manner, the natural provision would have been that if plaintiff could not get the occupation he should be paid in the ordinary way.

In this view I concur with some reluctance, in the result that the plaintiff's only remedy would be to compel specific performance, and if so, the claim should be against Deverill, instead of the defendant.

Unless we can assume the effect of the bargain between the parties to have been that the plaintiff was engaged to clear the land for the defendant, and as payment or value therefor he was to be allowed to occupy the clearance for a named time, I can see no legal ground on which to rest his right to recover.

If the dealing between them was of that kind, we might possibly, I think, uphold the verdict.

GWYNNE, J.—The proper conclusion to draw, as it appears to me, from all the evidence, is that the plaintiff was bargaining to obtain a lease similar to those which he knew had been granted by the defendant to Hover and Young, that is to say, a lease for ten years, and that the clearing of a specified number of acres per annum should be taken by the landlord in lieu of rent. The clearing of the land for the defendant was not the primary service to be rendered or work done for which the lease was, after the performance of the work, to be given as a mode of compensation, but the lease was the primary thing contracted for, and the work was to be reserved as a rent from year to year, during each year of the term. The contract was for an interest in land, for a term of ten years, whether the defendant agreed absolutely, as found by the jury, to guarantee the plaintiff the enjoyment of the land for the term of ten years, not-

withstanding the opposition of the tenants Hover and Young, or only, as the defendant himself swore, to guarantee him in the enjoyment in the event of his making an arrangement with the tenants to enable the defendant to do so.

In this view of the case it appears to me to be clear that the plaintiff cannot recover at law as upon a *quantum meruit*, for work done in clearing the fifteen acres, which he appears to have cleared upon his own shewing under this agreement for a lease. But, further, it appears to me from the evidence of Smith, the plaintiff himself, and his son, taken in connection with the terms of the letter of the 24th of December, 1869, written, addressed, and delivered by the defendant to the plaintiff, that the proper inference to draw as to the terms of the actual contract between the plaintiff and the defendant is that, although from some verbal understanding which the defendant insisted was come to between himself and the tenants at the time of executing the leases, to the effect that although the leases in terms covered respectively the whole of the north and south halves, yet the defendant was to be at liberty to make to other persons leases similar to those made to Hover and Young, so however as not to interfere with them respectively, nevertheless it was well known to the plaintiff that in fact the leases to Hover and Young, respectively, did give them absolute control of the respective north and south halves of the lot, so as to enable them, if they should think fit, to prevent the defendant executing effectually any such other leases; and that therefore it was necessary for the plaintiff, before he could come to any effectual and complete arrangement with the defendant, to make terms first with the tenants, or one of them, to obtain a surrender of a portion of the half of the lot held by them respectively.

If I could see that the plaintiff has here a claim for a purely money demand, founded upon equitable considerations merely, we might, under the second section of 36 Vic. ch 8, "The Administration of Justice Act of 1873," grant him relief in this action. It is there enacted that

“any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiff’s right to recover may be an equitable one only, and no plea, demurrer or other objection on the ground that the plaintiff’s proper remedy is in the Court of Chancery, shall be allowed in such action.”

But here it appears that the purchaser from defendant, namely, Deverill, had actual notice of the fact that the plaintiff was in possession of these fifteen acres. He was so informed by the tenants, or one of them. Having such notice Deverill was bound to enquire into and inform himself thoroughly of the plaintiff’s claim, and right to such possession, under penalty, in default of his so doing, of being made subject in a Court of Equity to the same relief which the plaintiff could substantiate against the defendant from whom Deverill purchased. And, as it seems to me, the plaintiff’s claim for relief, if any he has, would be for specific performance of the agreement for the lease, which, Deverill, having had notice of plaintiff’s possession, would be as liable to grant as the defendant would have been had the fee still remained in him. But the very foundation of this equity would depend upon the plaintiff establishing that the arrangement he had made with Hover was of such a nature as to enable the defendant to give a lease to the plaintiff of part of the land already comprised in Hover’s lease; and, in the absence of an actual surrender by Hover, I do not see how that relief could be granted, unless Hover should be a party consenting or bound by the decree. So far as we at present know it may be quite possible that what Deverill says Hover informed him as to the clearing of the fifteen acres by the plaintiff is true, namely, that it was done by the plaintiff under an arrangement with Hover as part of Hover’s rent to be reserved under his lease.

As the case stands at present, I think the rule must be made absolute for entering a nonsuit.

GALT, J., concurred.

Rule absolute.

M. A. CAMPBELL V. THE NATIONAL LIFE INSURANCE COMPANY.

Insurance Company—Acceptance of premiums after time elapsed—Proviso as to insured being in good health—Meaning of.

By the non-payment of the renewal premiums at the stipulated times, a policy of life insurance became forfeited. The policy provided that payment if made when over due, would not be considered as continuing the policy unless the insured was in good health at the time; but the practice of the company was to receive payment of such premiums, and to issue the renewal receipts within thirty days after the stipulated times, provided the insured were then in good health: *Held*, that the proviso as to the insured being in good health, did not apply to his actual state, but to the general understanding of the parties and their consequent action thereon.

Where, therefore, at the time of paying the premium and giving the receipt, the insured had in fact received an injury which soon after resulted in death; but it clearly appeared that no danger was anticipated by either the insured or his medical attendant, or by the defendants themselves, who had made enquiry and had full knowledge of his condition: *Held*, that the payment was good, and the forfeiture waived.

Held, also, that the proviso as to the insured being in good health, was to guard against frauds committed on the company, and not to prevent the company themselves, when in full possession of the facts, dealing with the insured.

Held also, that the general agents in Canada of a foreign company, must be regarded in the same light as the general agents at the head office in the foreign country.

THE declaration set out that defendants by a policy of insurance, dated the 25th of August, 1870, on the life of James Campbell, for \$1,000, in consideration of \$5.62 then paid, and of the payments of a like sum on or before the 25th day of August, November, February and May to the defendants, or one of their duly authorized agents, every year, the said defendants did thereby insure the life of James Campbell for \$1,000, the payment of the sum insured to be made to the plaintiff, then the wife of James Campbell, and certain of his children named, &c. Averment that the quarterly payment due on the 25th February, 1873, was not paid on the day it became due, but that afterwards the defendants waived the default, and accepted the said payment during Campbell's life time; and while the policy was in force Campbell died.

Pleas. 1. Did not promise. 2. Did not waive the default, and accept the payment during Campbell's life, as alleged.
Issue.

The cause was tried at Hamilton before Morrison, J., and a jury, at the Winter Assizes of 1874.

The policy was admitted.

At the end of the policy, following the signatures, is written :

“NOTE.—Agents of the Company are not authorized to make, alter or discharge contracts, or waive forfeitures.”

All the receipts, nine in number, given for the various quarterly premiums were produced. They are all in a uniform printed form, signed by the secretary of the company at the branch office Philadelphia, and countersigned by the Hamilton local agent; six being so countersigned by Dempsey. They all are dated as of the proper quarter day.

In the notice at the foot is the following : “ Agents cannot make binding or continue any policy, nor can they make, alter, or discharge contracts, or waive forfeitures, or bind the company in any way.

On all is crossed in red ink “ This payment if made when overdue will not be treated as continuing the policy unless insured is in good health at the time.”

It appeared that Campbell died on the 23rd March, 1873.

On Monday, March 1st, he had received a cut on the wrist. He was going about for several days. On the next Saturday a doctor was called in. Before this, on the 3rd March, he had gone to Dr. Henwood's office, who dressed the wound. He then fainted from loss of blood. An artery had been cut. The doctor considered that this was ultimately the cause of death. The doctor thought he would recover. The deceased called on the doctor about a week after. Danger was not apprehended till four or five days before his death.

The quarterly payment was due 25th February, and default had been made in payment.

The widow swore that one Dempsey, as agent for the defendants, had got her husband to insure his life, and used to call at the house for the premiums, as arranged with him; that he did not call on the 25th February, but

came after the first of March. She said she had not the whole sum ready, wanting \$1.62, and she offered to go out and get it; but Dempsey said she need not do so, that he would call again; that he was not afraid to trust Campbell, that even if any thing happened, it would be all right. He had not called on a former quarter day, but called after, and told Campbell that if the premium was paid within thirty days, it would be all right. On the day in question she says Dempsey saw Campbell in bed. This would seem to have been about the 11th or 12th of March. Next day, as Dempsey did not call, the plaintiff's father went to the defendants' office and saw Livingstone, the general agent, and said he came to pay the premium. The agent referred him to Dempsey, who he said would attend to it. Witness told him that Campbell had cut his wrist. The agent said he would send Dempsey down: that thirty days were allowed if he were in good health, and if Dempsey thought there was anything wrong he would send a doctor: that they should have the money at the house, and Dempsey should call and would receive the money, provided Campbell was in good health; that Dempsey would decide, and if there were any doubt he would send for a doctor. The next day Dempsey called; spoke of the father's visit to the office; saw Campbell, and said it was all right, and there was no necessity to send for a doctor. Mrs. Campbell paid him the premium, and he gave her the receipt, produced, and, (as she swore), told her that it was all right, even if anything did happen. For some days after this she said there was no apprehension of anything serious.

On the 10th April she said Dempsey tendered the premium to her. She declined to accept it.

For the defence it was objected that there was no evidence to establish a waiver.

The case however proceeded.

Livingstone, the general agent of defendants in Canada, (their head office being in Washington, U. S.), was called. He said Dempsey was authorized to take risks and receive premiums, and defendants entrusted him with the receipts

for premiums. He also proved the father of Mrs. Campbell calling to pay, and that he told him that if a doctor would give his opinion as to Campbell's state, that would authorize them to receive the premium. He denied telling him that Dempsey would decide, but that Dempsey would call to enquire.

Dempsey deposed that he was a canvasser for defendants, a sub-agent under the general agent in Canada: that he had got Campbell to insure; that the day before the last quarter was due he saw Campbell, who said he was not prepared to pay, but would pay in a few days: that he called in a few days, and Mrs. Campbell was not fully prepared to pay, and witness said he would call again. After this Livingstone told him to go and see Campbell, who had had an accident, and if it was serious witness was to see Dr. Barker, the defendants' medical adviser: witness went to the doctor, but missed him. He then went to Campbell's, and saw his wrist with an insignificant wound on it. Campbell told him Dr. Henwood had advised him it was insignificant, and not dangerous. Witness said he would receive the premium, subject to the approval of the company, and if there was nothing in the wound it was all right, and he read to him what was written across the receipt; that was on March 13th. He received the money, and paid it next day or so to the office to the secretary; and witness heard nothing further till after Campbell's death. He said that he explained at the office about the wound, when he paid in the money, and nothing was then said about a doctor's certificate.

After receiving the money he said he got a note from the office that he was not to take the premium without a doctor's certificate.

This was objected to. Witness said he could not find this note.

It was stated that a letter was written from the office to Dempsey, on the 13th March, not to receive the money without a doctor's certificate, but the witness could not say when it was sent.

The company's secretary said, that about the 9th of April he wrote to the plaintiff, repudiating the claim, returning the money, declaring that Dempsey had received it contrary to instructions, and asking a return of the receipt; that he did not remember when he received the money from Dempsey, but probably about the date of the letter, and that he got it for the purpose of returning it. The letter was headed, "—— April, 1873," and the writer could not swear when he wrote; and he swore that they never accepted payment on the part of defendants, nor could he say when it was paid into the office.

The evidence for the defence on these points was unsatisfactory.

The learned Judge left it to the jury on the second issue, saying, that if they believed that defendants' agent received it subject to approval of the company, to find for defendants; but if they did not so find, and were satisfied of the truth of the facts sworn to by plaintiff's witnesses, that there was evidence to go to them in favour of the plaintiff.

It was objected that they should have been told, that if they found Campbell was not in good health the company would not be bound unless they afterwards accepted the premium, and that the true state of Campbell's health was a question for the jury; and further, that even if Dempsey had made no stipulation as to the company's approval, there would be no waiver.

The jury found for the plaintiff.

In Hilary Term *MacKelcan*, for the defendants, obtained a rule *nisi* for a new trial on the law, evidence, and weight of evidence, and for misdirection on the grounds taken at the trial.

In this term *Robertson*, Q. C., shewed cause. It is admitted by the plaintiff that the premium was not paid until after the time for payment had elapsed, but the evidence shews that it was the custom of the company to entrust their sub-agents with the renewal receipts, and they were instructed to accept pay-

ment within thirty days after such time, and it appeared that Dempsey, the sub-agent, received the premium within the thirty days and paid it over to the company, and no objection was made until after Campbell's death. There was clearly therefore a waiver of the condition in the policy as to the time of payment: *Miller v. Brooklyn Life Ins. Co.*, Bigelow Ins. Cas., vol. ii. p. 35; *Bliss on Life Assurance*, 466; *Post v. Aetna Ins. Co.*, 43 Barbour 351; *Buckbee v. U. S. Ins., Annuity, and Trust Co.*, 18 Barbour 541; *Wing v. Harvey*, 5 DeG. McN. & G. 265; *Acey v. Fernie*, 7 M. & W. 151. As to the sub-agent receiving the amount conditionally upon the insured being in good state of health, the jury have found that there was no such condition.

MacKelcan, contra. The condition in the policy is, that if the premium is not paid within the proper time the policy is to become forfeited, and there is no proviso in the policy for thirty days grace. At the time the insured received his death wound the policy had become forfeited, and neither the general agent in Canada, nor the sub-agent, had any authority to receive the premium, and in fact the sub-agent only did so on the condition that the insured was in good health. The evidence shews that the general agent would not receive the premium, but when it was paid in he immediately returned it. It never was received by the company, and even if the money had been sent to Washington and had been received there it would only be on the condition of the assured being in good health at the time. There was clearly misdirection in not telling the jury that there could be no acceptance unless Campbell was in good health: *Mulvey v. Gore District Mutual Ins. Co.*, 25 U. C. R. 424; *Wing v. Harvey*, 5 DeG. McN. & G. 265; *Hendrickson v. Queen Ins. Co.*, 31 U. C. R. 547; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69; *Bissell v. American Tontine Life Ins. Co.*, Bigelow Ins. Cas., vol. ii., p. 150.

HAGARTY, C. J.—As a matter of fact the quarterly payment was not made on the 25th of February, and so the

policy was forfeited. The right to recover is rested on the alleged waiver and receipt by defendants of the premium after that day.

It was strenuously urged in argument, first, that no agent had any right to waive a forfeiture; and, secondly, that the sub-agent, Dempsey, when he received the money did so conditionally on the approval of the defendants.

The second point was one of evidence, and if the case turned wholly on it, we should not be disposed to interfere with the finding of the jury, or on the weight of evidence.

The first point seems the most serious, if it be necessary to enquire whether any forfeiture was waived.

It seemed clear on the evidence that the company had adopted a practice of receiving the premiums for thirty days after the day named, provided the assured were then in good health.

The memorandum printed in red ink across the receipts shews clearly that a payment after the prescribed day is contemplated.

Therefore payment after the prescribed day is in certain cases allowed to be made to the agent or agents authorized to receive payments of premiums.

Payment was made in the case before us to an agent authorized to receive it, if paid at the stipulated times.

In this view the case seems narrowed down to the point whether the payment to Dempsey must be considered as qualified by the condition that Campbell was in good health at the time of payment.

It is beyond doubt that at that time Campbell had received his death wound, and it is equally clear that neither defendants' agent nor the doctor in attendance on Campbell had any apprehension that the injury he had sustained was serious or likely to endanger life; and I would assume on the evidence, that on the 13th of March, (the day of payment,) had a doctor been applied to he would have reported favorably on the case. If he had done so and the agents in Hamilton had, thereupon, received the premium

and given the receipt, would the subsequent death of Campbell, and the evidence, that, notwithstanding the certificate, he was then mortally wounded, render the payment and receipt inoperative ?

In other words, must it be the actual state of the case, and not the general understanding of all the contracting parties, and their action consequent thereon, that is to govern ?

If on the 13th of March Campbell had applied to defendants to have his life insured, and the usual medical examination was favorable to the risk, and the defendants accordingly accepted it, and issued their policy as here, all being done in perfect good faith, should the fact of Campbell's death on the 23rd of March, contrary to all expectation, vitiate the insurance ?

If such an insurance would be good on the facts before us, it seems not easy to understand why the receipt in good faith of the premium should not be held sufficient.

It seems to me to be fairly presumed on the evidence that but for Campbell's death no difficulty would have arisen as to the payment.

I have not seen any direct authority on the point.

There are cases bearing on the question, whether answers as to an intending risk, untrue in fact, must be also knowingly untrue. In *Fowkes v. Manchester and London Assurance Association*, 3 B. & S. 917, there was the assured's declaration that certain particulars were correct and true throughout, such declaration to be the basis of the contract, and if it should appear that any fraudulent or designedly untrue statement, was contained therein, the policy was to be avoided.

There was a plea that certain of the statements were untrue in fact. There was also a plea that they were designedly untrue.

The first plea was demurred to. The Court held it insufficient ; they considered the latter part of the declaration as to fraudulent concealment and wilful mis-statement qualified the preceding part, and in effect explained what

was meant by "correct" and "true," and that the statement must be designedly untrue.

Cockburn, C. J., adds, at page 926: "So long as the person proposing to insure makes a statement honestly, which he believes to be true, although it may turn out to be incorrect in fact, the policy is not avoided."

The issue on the other plea was tried, and is reported in 3 F. & F. 440, before Cockburn, C. J., and the plaintiff had a verdict. The assured had answered that he had never been afflicted with gout. The Chief Justice said, at page 443, "the answer would not be false, merely because he had some symptoms which an experienced medical man might see indicated the presence of gout in the system;" and at page 444, "there is no positive evidence that the deceased knew he had gout."

In the policy in our case the provision is that "the statements and declarations made in the application for the policy, and on the faith of which it is issued, are in all respects true, *and without the suppression of any fact relating to the health, habits, and circumstances of the person insured, affecting the interests of the company.*

I incline to think that this provision would be construed on the principles that governed the case last cited.

Of course, where facts are stated, in the nature of a warranty that they are so, it is immaterial whether the person stating them knows or does not know the incorrectness of the statement.

In *Jones v. Provincial Ins. Co.*, 3 C. B. N. S. 65, the declaration made by the assured stated that he was not aware of any disorder or circumstance tending to shorten life or render an insurance more than ordinarily hazardous. It was pleaded that he was not in a good state of health, &c. and that he was afflicted with a disease tending to shorten life. Certain severe bilious attacks were proved, and varying medical testimony given as to their tendency to shorten life.

Martin, B., told the jury, at page 75, "that if the assured honestly believed, at the time he made the declaration,

that the bilious attacks * * had no (permanent) effect upon his health, and did not tend to shorten his life, or render an insurance upon his life more than usually hazardous, the fact that he was aware that he had had those attacks, (even though, without his knowledge, they had such a tendency), would not defeat the policy."

This direction was upheld by the Court, but a good deal turned on the form in which the objections were taken at the trial, and how the question for the jury was narrowed down.

In *Swete v. Fairlie*, 6 C. & P. 1, before Lord Denman, it was left to the the jury to say whether the deceased "represented truly the state of his health, according to the question put to him. 2. If he did not, did he know the state of health in which he had been, so as to furnish a proper answer to that question."

The jury found that deceased was not aware of certain matters that had taken place, (certain symptoms of mental alienation that had occurred some time before, but had disappeared,) and could not therefore communicate them.

There was a verdict for the plaintiff. It does not seem to have been moved against. It should be noticed that the insurance was effected by a third person interested in his life.

Anderson v. Fitzgerald, 4 H. L. Cas. 507, contains a full exposition of the distinction between a warranty and a representation in effecting a life insurance, (by Lord St. Leonards); and that the companies sometimes protect themselves by a stipulation that a statement that is not a warranty, but a representation, if made contrary to the fact, shall avoid the policy; adding "At law if the statement, though untrue, was not untrue to the knowledge of the party who made it, the assured is entitled to recover the sum, (the premium), which he has paid."

There is a very full review of the authorities in the elaborate judgment in *Wheelton v. Hardisty*, 8 E. & B. 232, and in error 285. I especially refer to Lord Campbell's judgment.

The cases are very numerous, but it is not necessary to mention them, as they are mostly to be found in the cases cited.

We must observe the true nature of the issue joined in this case.

The declaration admits the non-payment at the proper day, and avers that afterwards the defendants waived the default and accepted the payment during the life of Campbell.

The traverse is that they did not waive the default, and accept payment, as alleged.

I have already stated that, as it was not denied that it was the practice, in certain cases, to accept payment after the day named, and within the thirty days, we are relieved from any difficulty as to the authority of the agents to waive a forfeiture.

The money was paid to the sub-agent Dempsey, who had authority to receive payment of premiums, and the jury found that it was accepted unconditionally.

The evidence for the defence, as to when any notice of disclaimer or repudiation of the payment was sent. Dempsey's evidence was to the effect that he paid the money without much delay to the office, and heard nothing more about it until after Campbell's death. This gives the case a different complexion from that presented by the other witnesses for the defence,

I repeat that I think it is not an unfair inference, from the whole evidence, that it was not until after Campbell's death that any serious or substantial objection was raised on the defendants' part.

In this view I think the issue raised by the second plea—the only defence—was not improperly found for the plaintiff.

I do not think the learned Judge, on this issue, was not bound to leave the case to the jury as urged by the defendants counsel.

There is no direct issue as to the state of Campbell's health and it is only to be considered as tending to elucidate the issue actually joined.

I have already pointed out, perhaps at unnecessary length, my views as to the light in which all the contracting parties viewed the state in which Campbell was. There was no fraud or concealment; everything was supposed to be right, and the parties acted accordingly. The unexpected result of Campbell's death alone caused, in my judgment, the raising of any question or difficulty.

We are bound, I think, to regard what was done just as the parties understood it at the time, and not in the light of the subsequent unforeseen event.

GWYNNE, J.—There was evidence that the general agents of the defendants in Canada, the defendants being a foreign insurance company, received the premium from the sub-agent, Dempsey, within thirty days after the premium became due. There was evidence also that they were fully informed, before the payment, of the accident which had happened to the assured, and that they had the fullest opportunity of informing themselves, personally, of his condition and state of health, and that they availed themselves of this opportunity, by sending Dempsey to see him, and by receiving his report.

It must, I think, be taken then that the general agents, within thirty days after the premium was due, (within which time there was evidence that the company were in the habit of receiving over due premiums,) received the premium with a full knowledge of the then condition and state of health of the insured.

The general agents of a foreign company doing business in this country must, I think, for the purpose of receiving premiums, be regarded in the same light as the company, themselves, and we must, I think, hold that the payment made to such agents is the same as if made at the head office abroad, and that the knowledge and information brought home to the general agents at the head office in this country must be regarded in the same light, as if it was possessed by and brought home to the head office in the foreign country. The notice on the receipt, as it seems to me,

is to be construed so as to protect the company from being bound by payments after the day, accepted in ignorance of the then state and condition of the insured's health, if he, in fact, was not in good health; not to protect the company from their own act, intentionally done with the fullest knowledge of the state and condition of the insured's health, to the same extent as was possessed by the insured himself and all his friends.

It is to guard against frauds being committed upon the company, not to prevent the company themselves, when in full possession of the facts, dealing with the insured.

GALT, J., concurred.

Rule discharged.

M'KENZIE ET AL. V. KITTRIDGE ET AL.

C. L. P. Act, sec. 97—Plea of defence arising after suit.

Under the C. L. P. Act, sec. 97, to make a plea a good plea to the further maintenance of the action, it is sufficient if it disclose on its face matter which arose after the commencement of the action; no formal commencement is necessary.

Therefore in an action by creditors against shareholders of a company, a plea setting up the payment of their shares in full by defendants, not saying before the suit, and that a certificate to that effect was drawn up, sworn, and registered after the commencement of the suit, was held a good plea of a defence arising after suit, the defence being incomplete without the registry.

THE declaration was the same as in the previous report of this case, *ante* page 2.

The defendant pleaded a similar plea to the second plea in the previous report, *ante* page 4, except that it alleged that the certificate was made and drawn up, &c., after the commencement of the suit, to wit, on the 6th March, 1874, and was registered on such day.

The plaintiffs demurred on the grounds that the said plea affords no answer, inasmuch as payment without registration

does not relieve shareholders from liability: that the plea does not shew payment before the commencement of the suit, and that even if a payment prior to, and a registration subsequent to the commencement of the suit could constitute a defence, it could only be to the further maintenance of the suit, and would be no defence as regards the costs incurred previous to such registration; and because it does not shew that the payments were made in accordance with the terms of the statement or declaration of incorporation.

Burton, Q. C., for the demurrer. The plea here is different from the one in the former case, as it alleges a payment and registration after the commencement of the action, and being of matter arising after the commencement it should have been formally pleaded to the further maintenance of the action, and not being so pleaded must be taken to be pleaded in bar, and a plea of payment and registration after action is not a good plea in bar. It was also urged, as on the previous argument, that there must be a payment in full of the whole capital stock to relieve the individual shareholder from liability.

Meredith, contra. The plea is good. It does not allege that the payment was made after the commencement of the action; and, even if registration be a material averment, it is not necessary to plead a formal plea to the further maintenance of the action, but it is sufficient if it shew on its face a defence which arose after the commencement of the action: C. L. P. Act, sec. 97; *Brooks v. Jennings*, L. R. 1 C. P. 476; *Gresty v. Gibson*, L. R. 1 Ex. 112; *Tetley v. Wanless*, L. R. 2 Ex. 21, 275.

GWYNNE, J., delivered the judgment of the Court.

The Court has already decided in this case, upon a former argument, that a shareholder in the company named in the pleadings may avail himself of the protection of the 33rd section of the Consol. Stat. C., ch. 63, by paying up the full amount of his own shares, and obtaining a certificate of that fact to be registered, as pointed out in the 33rd section,

notwithstanding that the whole amount of the capital stock of the company is not paid up by all the stockholders under the provisions of the 34th section.

In so far, therefore, as the present demurrer reopens that decision, we simply adhere to the former judgment.

The only point that remains is that it is contended that the plea demurred to, not being expressed to be in bar of the further maintenance of the action, must be taken to be pleaded in bar of the action, and that it is not a good plea *in bar*, the certificate of payment not having been obtained and registered before action.

On the other hand, it is contended that this plea is well pleaded according to the fact, and is a good plea as a defence arising after the commencement of the action.

The question arises under the 97th sec. of the C. L. P. Act, which provides that any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion.

The plea sets up the payment by the defendants of the full amount of their stock within five years from the incorporation of the company, and that thereafter and after the commencement of the action a certificate to that effect was obtained, sworn to, and registered, &c.

Now, to make a plea a good plea to the further maintenance of the action, it is sufficient if the plea disclose upon the face of it matter which arose since the commencement of the action: *Howarth v. Brown*, 1 H. & C. 694; *Gresty v. Gibson*, L. R. 1 Ex. 112; *Brooks v. Jennings*, L. R. 1 C. P. 476.

It is not alleged, it is true, that the payment was made after the commencement of the action, but the defence being incomplete without the certificate sworn and registered, and that being stated as matter which has arisen since the commencement of the action, is sufficient to make the plea a good plea, as a defence arisen after the commencement of the action, upon the authority of the above cases.

Our judgment therefore will be for the defendant, upon the demurrer.

Judgment for defendant.

THE QUEEN V. DONALDSON ET AL.

Highways—Dedication—Evidence of.

Where in or prior to the year 1822, a lane or alley was laid out by the owner, connecting with two public highways, and which had been used by the public ever since, without any interruption from the owner during his lifetime, a period of 40 years.

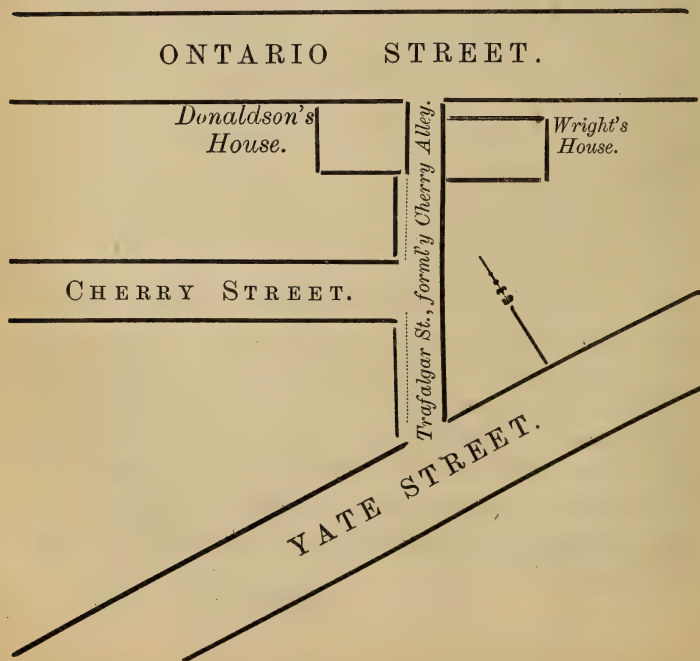
Held, that this, apart from the other evidence set out below, was sufficient evidence to go to the jury of an intention by the owner to dedicate the lane in question to the public.

Held, also, that a deed, executed by the owner, of a lot abutting on the lane, in which the limits of the lane were given, might be referred to to ascertain its true width.

Held, also, that the public were entitled to the whole width of the lane : that evidence of enjoyment by them of the part in dispute was not essential ; and that an obstruction by a person who knew he was obstructing a street already laid out, cannot afford any evidence to displace the intention of dedication by the owner.

THE defendants were convicted at the General Sessions of the Peace for the County of Lincoln, for obstructing a certain street in the Town of St. Catharines called "Cherry Alley," leading from Ontario Street to Yate Street, in the said town.

The following plan may be referred to :



The evidence, so far as material, is set out in the judgment.

The learned chairman, the Judge of the County Court, reserved a case for the consideration of this Court upon the following questions :

1. Whether there was any evidence of dedication to go to the jury. 2. Whether evidence of enjoyment on the part of the public of the part in dispute was essential to the success of the prosecution. And he postponed giving his judgment until the determination of the said questions.

In this term the case was set down for argument.

Harrison, Q. C., McDonald (of St. Catharines), and *J. G. Scott* for the Crown. The evidence clearly shews a dedication to the public by the original proprietor, Mr. Merritt, of the land in question, namely, a lane twenty feet wide, and that such dedication has been accepted by the public, and public money expended on it. Also, the deed from Merritt to Chase expressly recognizes a dedication. The mere user by the public is evidence to go to the jury of dedication, and here there has been a user since 1822. There is clear evidence of dedication, and it is only a question of boundary, and the deed shews its true width, namely, twenty feet : *Souch v. East London R. W. Co.*, L. R. 16 Eq. 108 ; *Municipality of Guelph v. Canada Company*, 4 Grant 632 ; *Attorney General v. Municipality of Goderich*, 5 Grant 402 ; *Attorney General v. Municipality of Brantford*, 6 Grant 592 ; *Regina v. Corporation of Yorkville*, 22 C. P. 431 ; *Fitzgibbon v. Corporation of Toronto*, 25 U. C. R. 137. It is not necessary to prove an actual user of the part in dispute, for the public are entitled to the whole width of the road, and not merely to the part used : *Turner v. Ringwood Highway Board*, L. R. 9 Eq. 418 ; *Rex v. Wright*, 3 B. & Ad. 681. The defendant, cannot set up his own obstruction knowingly made to displace the intention to dedicate.

J. Miller, (of St. Catharines,) contra. There is no evidence of any dedication to the public of the lane, or acceptance

by them to go to the jury; but, at most, only the grant of a private way to the persons to whom Mr. Merritt sold. No public money has been expended on it except a small sum, and that within the last twenty years. Dedication must be proved, either by means of a plan, or by the clearest affirmative evidence. The evidence, however, only shews an enjoyment of fourteen feet, and there has been no enjoyment of the public of the part in dispute, but it has been in possession of the defendant over forty years: *Regina v. Yorkville*, 22 C. P. 431; *Brown on Limitations*, 428.

GWYNNE, J., delivered the judgment of the Court.

As early as the year 1822, the whole of the land extending from what is called Ontario street to Yate street, in the Town of St. Catharines, including the piece of land called Cherry Alley, was the property of the late Honorable William Hamilton Merritt, who at that time and thenceforward, until his death in 1862, resided in the Town of St. Catharines. That a piece of land was set apart by Mr. Merritt at a very early period, with some motive, as a lane or alley, and called Cherry Alley, and extending from Ontario street to Yate street, appears from the evidence of several witnesses.

Mr. Henry Mittleberger, who has lived in St. Catharines since 1822, and who lived with Mr. Merritt from 1822 to 1824, speaks of the alley as in existence then. He did not know of any specified depth for it. On the north side there was an old building, but where this was situate I cannot gather from the evidence, unless it means Wright's house, which was erected on the north-east side of the alley; for Wright, he says, was there years before, and by Mr. Merritt's deed to Wright in 1824, it is clear that Wright's house was then up.

Mr. John F. Mittleberger came to St. Catharines in 1827. There were then, as he says, two houses, and only two houses, upon the lane, namely, Wright's, and Darby's. Darby's house, he says, seemed then to have been up some years. If he be correct as to this latter point, it could not be the

house spoken of by Junkin, as having been erected by Darby in 1827, and which, as I understand the evidence, constitutes part of the obstruction now complained of.

Junkin says, that from 1827 to 1831, he lived with Wright at this house on the alley, which is called Wright's house. He says that then Wright's lot ran down past what is called Cherry street, and that Merritt's house adjoined Wright's, that is, on the east side of the alley; and witness, in 1828, built a fence for Mr. Merritt on Wright's line, and when he put up this fence Mr. Merritt shewed him the line, and that it was in line with Mr. Merritt's own fence. This fence designated the eastern limit of the piece of land which was then known as Cherry Alley.

This witness further says that Cherry Alley was pretty well used in 1827, and that when they put up the fence along Wright's lot the opposite side of the lane was a common.

In 1827 Darby put up a house, which, as I understand the evidence, constitutes in part, at least, the obstruction complained of. Junkin assisted him to put it up. At this time, he says, there was nothing on this side of the line but Vandercan's stable. When Darby was putting up his house, witness says that both Wright and Vandercan said that it was four or five feet on the street, and that the street was measured for the purpose, and the house was so found to be. Darby said he could not help it, that there were some pine stumps in the way; and witness adds that there were some pine stumps there. Rufus Wright, and witness, and one Atkinson hunted up the line.

Now from this evidence it appears that as early as 1827, there were some means by which all these parties knew the western as well as the eastern boundary of the lane, as it was understood and claimed then to be, whatever may have been the purpose for which it was originally designed by Mr. Merritt, namely, whether for the convenience only of purchasers of lots from him, or for the general use of the public.

Mr. J. P. Merritt, the eldest son of Mr. W. H. Merritt, recollected the land for forty-three years, and he recollected

hearing, as long as thirty years ago, that Donaldson's house was on the street, that is, upon this Cherry alley, which the son of the original proprietor of the soil speaks of as a street. He says the alley was open through to Yate street, and that it was the subject of general report that Donaldson's house was on the road.

Then Mr. James Taylor has known the place, having lived in St. Catharines for thirty-eight or thirty-nine years, that is, since 1834 or 1835, and he says that Cherry Alley has been, during all that time, *used as a public street*. He says that until very recently he did not know what the width of the street should have been.

Then Mr. Alexander Boles says that he came to St. Catharines in 1823, where he carried on the salt works at the foot of the hill, until 1836, when he left St. Catharines and remained away until 1848. He says that in 1823 and thenceforth he used to use Cherry Alley six times a day in the transaction of business, passing and re-passing between the salt works and the town.

On the 3rd of February, 1824, Wright having previously erected his house on the land abutting upon the eastern limit of the lane, Mr. Merritt, by deed of that date, conveys to him in fee the lot upon which the house was erected, commencing the description of the piece of land conveyed, "at a stake at the northwest angle of the said lot No. 4, in the village of St. Catharines, having the main road leading to the lake opposite the northwest angle of the said Wright's dwelling-house," &c. The place indicated by the stake is the point of intersection of the easterly limit of Cherry Alley, (as it was then known upon the ground, and as it has been used ever since, as a public highway, lane, or street,) with Ontario Street.

Now in 1827, it seems that Mr. Merritt had already had a fence up designating the eastern limit of the lane, along the land then still held by him, south of and adjoining to the piece sold to Wright, and that in 1828 he pointed out the line along which Wright's fence was to be erected, separating the piece sold to him from the lane.

We find then that on the 28th December, 1831, Mr. Merritt conveyed to William C. Chace the piece of land on the west side of the alley, where the obstruction complained of now is, opposite to the piece of land conveyed to Wright, by the following description, that is to say: "All and singular that certain parcel or tract of land and premises, situate, lying and being in the village of St. Catharines," &c., "being composed of part of lot No. 18, in the 6th concession of the township of Grantham, and described as follows: First, one parcel or lot is butted and bounded as follows, that is to say, "commencing at the northeast angle of the said lot, *at the alley, twenty feet from the dwelling-house of Rufus Wright*; then south 26 degrees west, *along said alley, always keeping at the same distance from the lot of said Rufus Wright*, to the main road leading along the top of the hill to Boles's; thence north 49 degrees west 1 chain, 67 links, to corner of D. W. Smith's lot; thence north 20 degrees east 2 chains and 13 links to the northeast angle of said Smith's lot; thence south $59\frac{1}{2}$ degrees east 60 links, more or less, until it intersects the southwest angle of the main lot, *within about sixty feet of the alley*; thence north 26 degrees, east — chains more or less to main road leading to the lake; thence south $61\frac{1}{2}$ degrees, east — feet to the place of beginning; reserving therefrom the space of forty feet, or the width of an alley, through the centre of the said lot, parallel with the main road, and in a line with the alley now laid out on the plan of the village."

The piece thus reserved is that used as Cherry Street, which communicates with the western limit of Cherry Alley, at which point of junction at least the width of the alley, to the full extent of twenty feet, has always been preserved.

We have then in this deed a recognition by Mr. Merritt, that at the time this deed was executed Cherry Alley was known as a piece of land laid down upon the ground as an alley of twenty feet in width, extending from Main Road, (now Ontario street), to Yate Street, and providing for the communication with the alley of another street reserved half-way between Ontario and Yate Streets. The point of

commencement is at a point *at the alley*, twenty feet from the dwelling house of Rufus Wright, which point is the north-east angle of the piece conveyed; then extending *along the alley*, always at the same distance of twenty feet from Rufus Wright's lot to the road leading along the top of the hill to Boles's, that is, to Yate Street. Then the western limit of the lot conveyed is spoken of as distant sixty feet *from the alley*.

This deed, as it seems to me, affords very clear evidence of the fact that the alley spoken of had been laid out and set apart by Mr. Merritt to be used by some persons or other as a lane, alley, road, or way, of twenty feet in width, connecting with Ontario, Yate, and Cherry streets. And the only question seems to be as to whether the reservation of the lane was to be for the benefit of the public generally or for some particular portion of the public only namely, those only to whom Mr. Merritt may have sold or might sell lots on the block in question.

It is to be observed that there is nothing indicating a limitation of the use of the lane to any particular portion of the public. The very position of the lane itself, leading as it did from one public high road to another, namely, from Ontario Street to Yate Street, and connected on its westerly limit with another street or public highway, laid down by the proprietor, Mr. Merritt, half-way between these two public highways, seems to afford evidence which must be submitted to the jury upon the question of an intention to dedicate by Mr. Merritt. User by the public *is only evidence of dedication*, but other evidence of intention besides user may be received, and I confess it appears to me that the position of the lane thus in communication with three acknowledged public highways, in the absence of any intention in the owner of the soil to limit the user to a particular portion of the public, is evidence to go to a jury of an intention to dedicate the lane as a highway to the public.

But as to user, there seems abundant evidence to go to a jury for the purpose of enabling them to determine whether

there was an intention of dedicating by Mr. Merritt for the use of the public generally, or for the use only of a particular portion. From 1822 to 1828, until Darby erected the obstruction, the user was by the public generally. When Darby erected the first obstruction, in that year, his act was complained of as interfering with the street; and his only excuse for the interference, which was admitted, was necessity, arising from the presence of some pine stumps which compelled him to put his house out on the line of the street a few feet.

Now, it appears by the evidence of the surveyor, Mr. Gardner, that taking the westerly limit of the lane to be as described by Mr. Merritt in the deed of the 28th of December, 1831, the obstruction complained of is out into the lane just about the very distance which, in 1828, Junkin said it was alleged and claimed to be, so that before the deed of December, 1831, there must have been some known means of determining on the ground the outer limits of the lane.

The user of the lane or alley, wherever it has been used ever since 1822, has been a public user, and such user has, at Cherry street at least, crossed the western limit of the lane, as described in the deed of 1831. Then such user having been continued during the whole life of Mr. Merritt,—that is, for the period of forty years—there was the most irresistible evidence of what the intention of Mr. Merritt was in dedicating the lane, and that such intention was of dedication as a public highway.

The user establishing the intention, the deed of the 28th December, 1831, may be referred to for the purpose of determining what the boundaries of the lane so dedicated were, just as we might refer to a deed granting a right of way; and the deed, when looked at for the purpose of seeing what are the limits of the way, affords evidence of the fact that the lane had been laid out upon the ground some years prior to the execution of the deed, precisely as it is described in the deed.

In the absence, then, of any interruption whatever by Mr. Merritt, or any person claiming title under him, incon-

sistent with the enjoyment of the lane laid out by him as a public way at any time since the first laying out of the lane, in or prior to 1822, the passing of 22 Vic., ch. 99, consolidated in 22 Vic., ch. 54, sec. 336, had the effect of vesting in the municipality the highway as laid out by Mr. Merritt, subject to any rights in the soil which he who laid out the lane had reserved.

It would be preposterous to hold that the obstruction by Darby, who seems to have known he was obstructing a street already laid out, can afford any evidence to displace the intention of the original proprietor in laying out the lane. The non-user by the public at the place obstructed by reason of the obstruction, cannot be called in aid by the person causing the obstruction, for the purpose of shewing that, at the place obstructed, there was no evidence of dedication by the original proprietor.

I refer to *Poole v. Huskinson*, 11 M. & W. 827; *Regina v. East Mark*, 11 Q. B. 877; *Regina v. Petrie*, 4 E. & B. 737.

The only questions reserved for our opinion are: 1. Whether there was any evidence of dedication to go to the jury. 2. Whether evidence of user by the public of the part in dispute is essential to the success of the prosecution.

We answer the first of these questions in the affirmative, and the second in the negative.

Conviction affirmed.

DICKSON V. THE PROVINCIAL INSURANCE COMPANY.

Insolvency—Further insurance—Change of occupation—Renewal—Pleading—Departure.

Declaration.—First count: On a fire policy dated 22nd September, 1869, made by defendants to one B., for one year, with condition for renewal; alleging that B. renewed to 22nd September, 1873; that prior to 25th January, 1872, he became insolvent, &c., and that the plaintiff was his assignee, and at the time of loss, was solely interested; that the premises were destroyed by fire on the 13th of March, 1873, whereby the plaintiff, as assignee, became entitled to recover the insurance from defendants: breach, non-payment. Second count: setting out apparently the same policy, &c., as in the first count, averring an insurance to B. and renewals by him, and loss by fire on the 14th March, 1873, whereby B. became solely interested; and that after the fire and before suit, namely, on the 5th of November, 1872, B. by writing assigned to plaintiff, as assignee in insolvency, all his interest in said insurance, &c.

Second plea: that by one of the conditions, the renewal policies became avoided if insured, or his assigns should effect any further insurance, and should not with reasonable diligence notify the company, and have it endorsed; that the plaintiff became assignee before the fire of B.'s estate and effects, including this property and policy; and then effected a further insurance in the Western Assurance Company; and that neither he nor B. gave notice, &c., whereby the policy was avoided. *Held*, plea good, for the plaintiff was B.'s assignee within the policy, and as such became possessed of B.'s policy for the benefit of the estate, and in such interest effected the second insurance.

An equitable replication to this plea alleged that when the plaintiff effected the further insurance, he was ignorant of this insurance by B.; that, as soon as he became aware thereof, he, with all reasonable diligence notified defendants, and by their default it has not been endorsed. *Held*, bad, for the assignee's ignorance could not deprive defendants of the benefit of their express stipulation.

A further replication alleged, that defendants with full notice of B.'s insolvency, and plaintiff becoming assignee, accepted from B. the renewal premium, and renewed the policy to him and for his benefit, from September, 1872, to September, 1873; that the subsequent insurance was for the plaintiff's benefit as assignee, and that B. had an insurable interest in the property greater than the sum insured with defendants, as they knew. *Held*, bad, for it shewed no new contract released from the stipulation relied on in the plea.

Third plea: that before the loss, the plaintiff became the assignee, and the policies and insured property became absolutely transferred and vested in him; and he became and was the insured under the policy, and sustaining damage, but that he did not give notice of the loss, &c. *Held*, plea bad.

Equitable replication: that before the loss, the property was not absolutely vested, &c., in plaintiff, but B. still had an insurable interest therein to the property to the amount of the policy, which defendants knew, and they renewed the policy to him for value for a year, during which the loss occurred; and B. who was the person sustaining loss, &c., gave the notice and proofs. *Held*, bad, for it was a departure from the first count of the declaration, which averred a sole interest in the plaintiff; and that B. had no insurable interest apart from the plaintiff.

Fourth plea: that by one of the conditions, defendants were to be notified of all changes of occupation, or of vacancy; that at the time of insur-

ance, the premises were vacant, and afterwards they were occupied by B., in part as a dwelling house, and in part as an Orange lodge; and defendants were not notified.

Equitable replication; that when the policy was made, defendants knew that the building was in course of construction, and that B. intended to occupy it as a dwelling; and that afterwards, with such knowledge, B. occupied, as "in the fourth plea alleged;" and defendants, with knowledge thereof, received renewal premiums down to the time of the loss without objection. *Held*, replication good, and that it sufficiently shewed notice to defendants of the occupation as a lodge.

Sixth plea: averring B.'s insolvency and assignment to plaintiff on the 25th January, 1872, and that the current year expired in September, 1873, and that the plaintiff did not renew by paying the premiums, &c., and so that policy was at an end. Equitable replication: that defendants should not be allowed to so aver, because B., under whom plaintiff claims, duly paid up renewal premiums to defendants, who accepted, and gave their receipts therefor, declaring policy renewed, &c., which receipt B. delivered to plaintiff, who adopted his act.

Held, replication good, for B.'s payment in renewal, and taking the receipts in his own name, would enure to the benefit of the estate.

DECLARATION. First count: on a policy of insurance against fire, on a certain building of one Joseph Bateman, dated the 22nd September, 1869, made by the defendants to the said Joseph Bateman for one year. The declaration set out the conditions, amongst which was a condition for renewal, and according to which the renewal was to be held to be under the original representation, in so far as it might not be varied by a new representation in writing, &c.; and alleged that the said Joseph Bateman renewed to 22nd September, 1873: that prior to the 25th January, 1872, he became insolvent, &c., and that the plaintiff was his assignee in insolvency, and at the time of the loss the plaintiff was solely interested; that the premises were destroyed by fire on the 14th of March, 1873, whereby the plaintiff, as such assignee as aforesaid, became entitled to recover from the defendants the whole amount of the insurance; and averring as a breach non-payment.

Second count: on a policy of insurance, of the same date as in the first count, setting out apparently the same policy of insurance, property and contract, and averment of renewals by the said Joseph Bateman. It then averred a loss by fire on the 14th March, 1873, whereby it was alleged that the said Joseph Bateman became solely interested in the premises to the amount insured; and that after the

fire, and before this suit, to wit, on the 5th November, 1873, he did by writing assign to the plaintiff, as assignee as aforesaid, all his interest in the claim arising out of the said contract, whereby the plaintiff, as such assignee as aforesaid, became entitled to recover, &c.

Second plea: setting out a condition in the several policies, "that if the assured or his assigns should thereafter make any other insurance on the said property, and should not with all reasonable diligence give notice thereof to the defendants and have the same endorsed on the said policies respectively, or otherwise acknowledged by them in writing, the said policy should cease and be of no further effect: that the plaintiff before the said fire became assignee of the estate and effects of the said Joseph Bateman, as in the first count mentioned, and, amongst others, of the said insured property and policy of insurance; and after he so became assignee thereof, and before the said fire, the said plaintiff effected a further insurance on the said property in the Western Assurance Company, and neither the plaintiff nor Bateman gave notice as required, whereby the said policy ceased and became of no further effect.

Third plea: that before the said alleged loss and damage by fire, in the said first and second counts respectively mentioned, the plaintiff became assignee in insolvency, &c.; and the said insured property and the said policies of insurance became and were absolutely transferred to and vested in the plaintiff, and the plaintiff became and was the insured under the said policies, and the person sustaining damage and loss by the said fire; and the plaintiff did not forthwith give notice of the said loss and damage to the defendants or their agent, and as soon after as possible deliver in a particular account of such loss or damage, signed with his own hand and verified by his oath or affirmation as required by the condition of the said policies in that behalf, whereby the said alleged loss has not become payable.

Fourth plea: that the said policies were and are subject

to a condition thereon endorsed in the words following: "In all buildings insured by this company, all changes of occupation, either by tenants or otherwise, or any vacancy of the buildings, if the same shall be left vacant for one month, shall be immediately notified to the manager of the company in writing, and acceded to in writing by him, otherwise the policy shall be void;" that at the time of the making of the said policies the said buildings were unoccupied, and that after the making of the said policies the said buildings became and were occupied by the said Joseph Bateman, in part as a dwelling-house, and in part as a lodge-room by the members of an Orange Lodge, which occupation was not notified to the manager of the defendants' company in writing, or acceded to by him in writing, whereby the said policies became void.

Fifth plea: that before the said loss or damage, and before the said plaintiff became assignee, &c., the said insured property was by deed conveyed in fee by the said Joseph Bateman to one John Campbell, who by deed conveyed the same in fee to one Agnes Bateman, to whom the said policies, with the consent of the defendants in writing endorsed on the said policies, were duly assigned, as required by the terms of the said policies; and the said Agnes Bateman thereby became the assured under the said policies; and the said defendants have not consented in writing or otherwise to the assignment of the said policies to the said Joseph Bateman or to the plaintiff; and it was and is provided, in and by the said policies, that the interest of the insured therein is not assignable, unless the assignee before any loss happen shall give notice in writing of the assignment, and have the same endorsed on or annexed to the policies and signed by the president or manager.

Sixth plea: that the said Joseph Bateman became insolvent, and assigned his estate and effects to the said plaintiff, on the 25th January, 1872, and the current year of the said insurance expired on the 18th January, 1872, and the plaintiff did not renew the said policies by paying

the premium, as required by the said policies and the conditions thereon endorsed; and the said policies were not at the time of the said loss and damage valid and existing policies.

Second replication, on equitable grounds, to the second plea: that at the time the plaintiff became assignee, &c., and insured his interest as such assignee, he was ignorant that the said Joseph Bateman had effected an insurance with the defendants; and that, so soon as he acquired such knowledge, he did with all reasonable diligence give notice of his (the plaintiff's) insurance to the defendants, and the same has not been endorsed on the said policies respectively, or otherwise acknowledged by the defendants in writing, solely by reason of the acts and defaults of the defendants, &c.

Third replication, on equitable grounds, to the second, plea: that after Bateman had assigned his estate and effects in insolvency to the plaintiff, and after the said plaintiff became assignee of the estate and effects, the defendants, after full notice, &c., accepted from the said Joseph Bateman the renewal premium money to renew, and they did renew the said policy to him and for his benefit from the 18th September, 1872, to 18th September, 1873; and that the said insurance effected by the plaintiff in the Western Assurance Company was for his, the plaintiff's, benefit as such assignee; and that, at the time of the said renewal insurance and of the said fire, the said Joseph Bateman had an insurable interest in the said property to an amount greater than the said sum insured with the defendants, as the defendants then well knew.

Second replication, on equitable grounds, to the third plea: that before the said property was destroyed by fire, the said property and policy had not become and were not absolutely transferred to and vested in the plaintiff, but that the said Joseph Bateman had an insurable interest still remaining in him in the said property to the extent of the amount of the said policy, which the defendants well knew, and knowing which they renewed the said policy to

him for valuable consideration for a year, to wit, from 18th September, 1872, to the 18th September, 1873, during which period the said property was destroyed by fire as aforesaid; and that he, the said Joseph Bateman, who was the person sustaining damage and loss by the said fire, did then give timely notice, &c.; and delivered a particular account, &c., as required by the policy and by the conditions.

Second replication, on equitable grounds, to the fourth plea: that on the 22nd September, 1869, when the policy was made and issued to the said Joseph Bateman, the defendants well knew that the building was in course of construction and not completed, and that Bateman intended to occupy the same as soon as completed: that shortly afterwards, and during the said year, 1869, the said building became and was completed, as defendants well knew: that thereupon, during the year last aforesaid the said Joseph Bateman entered into occupation of the same, as in the said fourth plea alleged, as the defendants well knew; that afterwards the defendants accepted and received from the said Joseph Bateman the premiums payable for the continuance of the said policy of insurance during the year, (setting out each year down to the loss), and so that it would be inequitable and a fraud on the said Joseph Bateman, and on the plaintiff, for the defendants to be allowed to set up the facts alleged in the said fourth plea as a defence in this action; and that the defendants, under the circumstances, ought not to be allowed so to do, and ought to be estopped and prevented from so doing.

Second replication, on equitable grounds, to the sixth plea; that the defendants ought not to be allowed to say that the plaintiff did not renew the said policy by paying the premium as required by the policy and the conditions, because that the said Joseph Bateman, under whom the plaintiff claims, before the 18th September, 1872, offered to pay and did pay to the defendants the amount of the premium for the renewal of the said policy for the year from the 18th September, 1872, to the 18th September, 1873, and the

defendants accepted and received the amount so offered as and for such premium, and issued their receipt for the same, wherein they declared that the said policy was renewed, &c., which the said Joseph Bateman afterwards delivered to the plaintiff, who thereupon adopted the act of the said Joseph Bateman.

Demurrer to pleas. To the second plea. 1. That the plaintiff is not an "assign" within the meaning of the said policy. 2. That an insurance by the plaintiff of his interest as assignee in insolvency of Joseph Bateman did not avoid the said policy. 3. That the said second plea confesses the declaration without sufficiently avoiding the same.

To the fourth plea: that the said condition is inapplicable to a building in course of completion at the time when insurance is effected and afterwards becoming occupied by the person insuring; that no change of occupation, either by tenants or otherwise, or any vacancy of the building within the meaning of the plea, is shewn in the said fourth plea.

Demurrers to the replications.

To the second replication to second plea: that the ignorance of the plaintiff that Joseph Bateman had effected the insurance with the defendants in the declaration mentioned, does not prevent the subsequent insurance effected by the plaintiff avoiding the policy: that it does not appear whether the notice he gave of his insurance was given before or after the fire; if after, it could not avail: that it was the duty of the plaintiff to produce the policy to the defendants to have the notice of the subsequent insurance endorsed, and it is not averred that the policy was produced to the defendants for that purpose: that it does not appear defendants were required to acknowledge said other insurance; that it was optional with defendants to acknowledge or not, and if they did not acknowledge the policies became void.

To the third replication to second plea: that the said replication is a departure from and contradicts the first count of the declaration, which avers that at the time of the fire or loss the plaintiff was solely inter-

ested in the said insured premises, and the replication sets up that the said Joseph Bateman was interested therein: that the said declaration is based upon policies of insurance under defendants' seal, and said declaration further shews that before the fire, and before the said last receipt was given, the said Joseph Bateman became insolvent and made an assignment of all his estate and effects, pursuant to the Insolvent Act of 1869, to the plaintiffs, whereby, both at law and in equity, the said policies passed to the plaintiff, and the giving a receipt, after the assignment in insolvency, for the premium could give no right in the policy to the said Bateman, and the facts in said replication shew no cause of action in the said Bateman, or the said plaintiff, in respect of payment of the said alleged premium: that if the facts alleged shew any cause of action or right in equity, it is on the premium receipts as a new insurance for the benefit of Bateman personally after the assignment, and no such claim is set up in the declaration; and the facts averred in the declaration and second plea, and not denied in said third replication, shew that said Bateman had at the time of paying the premium no insurable interest; that the said replication contradicts the plaintiff's first count, wherein it is alleged the plaintiff was solely interested in the said insured property.

To the second replication to third plea: that the said declaration shews the said property had been assigned to the plaintiff under an assignment of all the said Bateman's estate and effects, according to the Insolvent Act of 1869 and, if so, no interest therein insurable or otherwise would remain to the said Bateman, except the said property were vested in him as a trustee, in which case any right of action in respect of the property or policy would not pass to the plaintiff.

To the second replication to fourth plea: that the said replication avers that the said Joseph Bateman entered into occupation of the said building to defendants' knowledge, but it does not allege that defendants had knowledge of the occupation of part of the said building by the members

of an Orange lodge ; that nothing in the said replication alleged is a waiver of the condition of the said policy, requiring notice in writing of the change in occupation, and of the defendants' manager acceding thereto in writing.

To the second replication to sixth plea: that the said replication does not shew when the said plaintiff adopted the act of the said Bateman, whether it was before or after the fire: that the said renewal receipt was a renewal of the policy to Bateman personally, and not to the plaintiff; and from the declaration it appears that Bateman then had no interest in the said property; and it is not averred, nor does it appear from said replication, that the defendants intended to continue said policy to the plaintiff.

Harrison, Q. C., and Dickson, for the plaintiff. As to the second plea. The plaintiff is not an assignee within the condition, as it refers to where the instrument is expressly assigned by the act of the parties, and not, as here, by operation of law. Also, the condition as to further insurance does not apply, for it means no further assurance by the same person who before insured, and in the same interest, and the assignee and insolvent have separate interests. It is like the case of mortgagor and mortgagee: *Marks v. Hamilton*, 7 Ex. 323, and note to Amer. ed.; *Kerr v. British America Assurance Co.*, 32 U. C. R. 569; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; *Burton v. Gore District M. Ins. Co.*, 14 U. C. R. 342, 12 Grant 156; *Livingstone v. Western Assurance Co.*, 14 Grant 507; *Woodbury Savings Bank v. Charter Ins. Co.*, 31 Conn. 518; *Hammerley v. De Biel*, 12 C. & F. 45; *Freeman v. Cooke*, 2 Ex. 654; *Fitzgerald v. Fitzgerald*, 20 Grant 410; *Kerr on Frauds*, 47. The second replication to this plea is a complete answer; and under sec. 8 of The Administration of Justice Act, 1873, according to equity and good conscience, the plaintiff must succeed. The third replication to the second plea, and second replication to the third plea, raise the question under the second count of Bateman's separate interest, the first count applying to plaintiff's separate interest. The

third replication shews what amounts to the issuing of a new insurance to Bateman of his interest after the insolvency, and therefore the assurance by plaintiff in the Western was not a further assurance. The second replication to the third plea shews that Bateman, as in his separate interest, gave the notice, &c., and this is clearly sufficient. As to the fourth plea, the condition only applies to buildings occupied at the time of the insurance, and to a change of occupation afterwards occurring, and not to a building in course of construction, and afterwards occupied by the insured; and the replication shews a waiver of the condition. The conditions do not absolutely avoid the policy, but only render it voidable: *Armstrong v. Turquand*, 9 Ir. C. L. R. 32; *Wing v. Harvey*, 5 DeG. McN. & G. 263; *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant 418; *Young v. Austen*, L. R. 4 C. P. 553; *Stanton v. Austin*, L. R. 7 C. P. 651; *Redway v. McAndrew*, L. R. 9 Q. B. 74; *McCulloch v. Gore District M. Ins. Co.*, 32 U. C. R. 610; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69. The replication to the sixth plea is good; it shows an adoption by plaintiff of Bateman's act in paying the premiums and renewing the policy. It does not matter who paid the premiums.

M. C. Cameron, Q. C., and *E. H. Duggan*, contra. The latter pleadings need only be referred to. The second replication to the fourth plea is no answer. It does not allege that the company had knowledge of the occupation of part by Bateman and part by the Orange society. It is quite consistent with it that Bateman might have first occupied and then rented to the Orange society. As to the second replication to the sixth plea, it is no answer. It admits a renewal to Bateman, and does not allege that it was for the benefit of the plaintiff, nor does it shew when the plaintiff adopted his act; also, it admits that the money was not paid out of the assets of the estate, and Bateman could not make himself a creditor of the estate. The cases shew that the conditions of the policy must be strictly complied with: *Hendrickson v. Queen Ins. Co.*, 31 U. C. R. 547; *Ashford*

v. *Victoria M. Ass. Co.*, 20 C. P. 434; *Mason v. Andes Ins. Co.*, 23 C. P. 37; *Smith v. Provincial Ins. Co.*, 18 C. P. 223.

HAGARTY, C. J., delivered the judgment of the Court.

The plaintiff sues as assignee in insolvency of Joseph Bateman.

The declaration contained two counts.

The first count sets out a fire policy, dated the 22nd September, 1869, made by defendants to one Joseph Bateman, for one year, with a condition for renewal: that Bateman renewed it to 27th September, 1873; that Bateman prior to the 25th January, 1872, became insolvent, &c., and the plaintiff was his assignee, and at the time of the loss was solely interested; and that the premises were destroyed by fire on the 13th of March, 1873, whereby the plaintiff, as assignee as aforesaid, became entitled to recover from the defendants the whole amount of insurance: breach non-payment.

The second count sets out that by a policy dated the same date as before, the defendants insured Bateman, describing apparently the same property and the same contract, and averment of renewals by Bateman. A loss by fire is then averred on the 14th March 1873, whereby Bateman became solely interested in the premises to the amount insured, and after the fire and before this suit, namely on the 5th November, 1873, Bateman did by writing assign to the plaintiff, as assignee as aforesaid, all his interest in the claim arising out of the said contract, whereby the plaintiff as assignee as aforesaid became entitled to recover, &c.

The second plea sets out a condition in the "several policies," that if the insured or his assigns should thereafter make any other insurance, and not with reasonable diligence give notice and have it endorsed on the policies, the policy should cease: that the plaintiff became the assignee before the fire of the estate and effects of Bateman, and amongst other effects of the insured property and policy, and after becoming assignee and before the fire the plaintiff effected a further insurance with the Western Assurance Company for

\$1,000, and neither he nor Bateman gave notice as required, whereby the policy was avoided.

This plea is demurred to as being no answer; that the plaintiff is not an assignee within the meaning of the policy, and that an insurance by the plaintiff of his interest as assignee did not avoid the policy.

We think the plea is a good answer. The assignee in insolvency cannot, we think, acquire any higher interest as against the underwriters than the insolvent had. He either simply represents him under the policy, and is subject to all his undertakings in reference to the subject matter, or he is simply his "assign," directly so by the assignment alleged to have been executed under the Act, or by the mere operation of the statute, as having vested in him all the estate and effects of the insolvent.

It is not easy to understand how an important stipulation, as to a subsequent uncommunicated insurance, in the original contract, can be violated with impunity by the assignee. In the present case, it was not by any act of the insolvent that the condition was broken, but by the direct act of the assignee, after his right had accrued.

In this respect the case is the converse of *Burton v. Gore District M. Ins. Co.*, 14 U. C. R. 342, 12 Grant 156. Commenting on the latter case the Court of Queen's Bench, in *Gilchrist v. Gore District M. Ins. Co.*, 34 U. C. R. 15, say that "A further insurance must mean by the same person or in the same interest as the person who has before insured. Separate insurances by persons having different interests in the same property cannot benefit the parties, nor can they harm the insurers."

Here the assignee could have no separate interest. He became owner of the whole insurance effected by the insolvent for the benefit of the estate. His subsequent insurance in his own name with another company would, if recoverable, enure to precisely the same interest, and the insolvent's resulting interest in any surplus of his estate after all debts, &c., are paid, would be the same under both policies.

The plaintiff seeks to answer this plea by replying equita-

bly, that when the assignee effected the second insurance he was ignorant of the fact that Bateman had effected the present insurance with the defendants, and that as soon as he became aware thereof he with all reasonable diligence gave notice to the defendants, and it has not been endorsed or acknowledged by them by their default.

This is demurred to.

We think it is no answer. The ignorance of the assignee is no reason for depriving the defendants of the benefit of their express stipulation.

In a case of *Mason v. Andes Ins. Co.*, lately decided in this Court, 23 C. P. 37, we expressed our views of the great importance and general bearing of this condition. If the company with whom the assignee effected the insurance had a like clause as to being notified of all previous or existing insurances, we think the plaintiff could hardly have excused the non-communication by the assertion that he was ignorant of their existence.

Another equitable replication alleges that the defendants after Bateman's assignment in insolvency and plaintiff becoming assignee, and with full notice thereof, accepted from Bateman the renewal premium to renew, and they did renew the policy to him and for his benefit, from September, 1872, to September, 1873; and that the subsequent insurance with the Western Assurance Company was for the plaintiff's benefit as assignee; and that he, Bateman, had an insurable interest in the property to an amount greater than the sum insured with the defendants, as they knew.

This is also demurred to, and it seems to us to be no answer.

What Bateman did was simply to renew the original policy, which contained the stipulations relied on as a defence. All moneys recoverable on that policy must have gone to the plaintiff as assignee, and Bateman paying the premium for renewal can only be taken as an act to preserve from lapse an important asset of his estate. Nothing alleged in the replication can be taken as establishing any new contract, released from the stipulation just provided. In fact it is set out in the declara-

tion that a renewal is always to be held as made under the original representation &c.

We cannot understand how a mere renewal or prolongation of the first contract, by either Bateman or his assignee, can in any way deprive the defendants of their right to the protection of the stipulation as to further insurance.

We think the second plea stands undisplaced, and is a bar to the action.

For the purposes of costs we must notice the other demurrers.

The third plea sets out that before the loss the plaintiff became assignee in insolvency, &c., and the policies and insured property became absolutely transferred to and vested in the plaintiff, and the plaintiff became and was the insured under this policy, and the person sustaining damage, and that the plaintiff did not give notice or deliver an account, &c., signed with his own hand, and verified by his oath.

To this an equitable replication states, that before the loss the property was not absolutely vested in or transferred to the plaintiff, but Bateman had an insurable interest still remaining in him in the property, to the extent of the amount of the policy, which the defendants knew, and they renewed the policy to him for value for a year, during which period the loss occurred, and Bateman, who was the person sustaining loss, gave the notice and proof, &c., as required by the conditions, &c.

This is demurred to.

It certainly seems open to the objection that it is a departure from the declaration, and a setting up of an insurance differing in its nature from that sued upon, contradicting the first count, which avers a sole interest in the plaintiff.

The plea is pleaded to both counts. It seems clearly bad to the first count.

It seems clear that on the whole pleadings both the plaintiff and the defendants only assert the existence of one, not of two insurances. This is plain from the plaintiff's replications. Then, the second count, after averring the policy made with Bateman, and the renewals by him, avers that

after the loss he, by writing under his hand, assigned his interest in the debt or claim, arising out of the contract, to the plaintiff as assignee as aforesaid, whereby the plaintiff became entitled to recover, &c.

Now, these averments cannot alter the true effect of Bateman's insolvency. It seems idle to set up an alleged assignment to the plaintiff "as assignee as aforesaid," other than the assignment the law provides for. The whole suit is brought by the plaintiff in the character of assignee in insolvency. The whole interest of Bateman in the sum insured is vested by law in the plaintiff. Bateman was bound to disclose to his assignee the existence of this policy; and even had he assigned to another person, and that person had recovered from the company, it would be recoverable by the plaintiff from such third person as money had and received. See *Schondler v. Wace*, before Lord Ellenborough, 1 Camp. 487. Nor would the assignee be considered as abandoning his right, so long as he was in ignorance of its existence.

The true relation of an insolvent to his assignee is explained in *Jackson v. Forster*, 1 E. & E. 463.

The distinction between the assignee by operation of law, and an ordinary assignee for value, is clearly defined.

We think the replication to the third plea is bad; and as only costs are involved, we do not think it necessary to enter into a discussion as to how the proof of loss is to be made, when the insured becomes insolvent in an ordinary case. Possibly no actual difficulty may occur for a long time.

The case cited of *Marks v. Hamilton*, 7 Ex. 824, merely shews that an insolvent in the actual possession by leave of his assignee, of chattels, has an insurable interest therein, as he is bound to account therefor.

The defendants' fourth plea sets out a condition, that all changes of occupation by tenants, or any vacancy, must be notified in a month, &c.; and that at the time of the insurance the premises were vacant; and that after the policy was made they were occupied by Bateman, in part as a dwelling house, and part as a lodge room by members of an Orange lodge, and not notified to the defendants, &c.

To this the plaintiff replies, that when the policy was made the building was in course of construction, as defendants knew, and that Bateman intended to occupy it as a dwelling, and that afterwards Bateman, with their knowledge, occupied, "as in the fourth plea alleged," as they knew; and with such knowledge they continued to receive renewal premiums down to the loss, without objection; and so defendants should not be allowed to set up the facts stated in the fourth plea.

This is demurred to as not averring that defendants had had notice of the part occupation by the lodge members, and that it shews no waiver of the condition, &c.

The policy states the risk to be on a building in course of completion. The replication charges an acceptance of the renewal premiums, with full knowledge of Bateman's entering into occupation, *as in the fourth plea alleged*.

This, we think, covers the alleged occupation, "as a dwelling house, and in part as a lodge room."

It is, in effect, a mere description of how Bateman occupied; and it is his occupation in the manner alleged that is put in issue.

Had the defendants desired specifically to raise as a defence the occupation as a lodge room, we think they should have expressly so stated, and not by demurring have admitted the material averment in the replication.

The equity set up in the replication seems to us to be clear. The principle is well established by such cases as *Wing v. Harvey*, 5 DeG. McN. & G. 563.

The sixth plea avers Bateman's insolvency and assignment to the plaintiff on the 25th January, 1872, and that the current year expired in September, 1872; that the plaintiff did not renew by paying the premiums, &c., so the policy is at an end.

To this the plaintiff replies, that they should not be allowed so to aver, because Bateman, under whom the plaintiff claims, duly paid up the renewal premiums to the defendants, who accepted the amount and gave their receipt therefor, declaring the policy to be renewed, &c., which

receipt Bateman afterwards delivered to the plaintiff, who thereupon adopted his act.

This is demurred to as being no answer; not shewing when the plaintiff adopted Bateman's act, whether before or after the fire, and that the renewal was to Bateman personally and not to the plaintiff; that Bateman had then no interest, nor does it appear that the defendants intended to continue the policy to the plaintiff.

We think the replication good.

We see no objection to Bateman's continuing to pay the renewal, though the amount recoverable might or might not belong to his assignee. Unless it would be a defence that Bateman paid without notifying the insurers of his insolvency, we do not see how his payment in renewal and taking the receipt in his own name, would not clearly enure to the benefit of his estate. It was an act done to protect an important portion of his assets.

Had he assigned the property or the policy in the ordinary way, as distinct from a statutable assignment in insolvency, a different case would be presented.

Our judgment is for the defendants on the demurrer to the second plea, and to the second and third replications to the second plea; and on the demurrer to the replication to the third plea; and for the plaintiff on the remaining demurrers.

Judgment accordingly.

WALKER V. KELLY.

Dependent and independent covenants—Pleading—Insufficient statement of breach—Departure.

Declaration on an agreement, whereby defendant agreed to give and plaintiff to take a lease of an hotel in Toronto in the occupation of the defendant, for ten years, from the 29th September, 1873, when possession was to be given; that defendant's license to sell liquors in the hotel was to be transferred at or before possession was given to plaintiff, who was to pay a proportionate part of the cost thereof for the unexpired part of the year; and that all the furniture then in use in the hotel, and the stock of liquors, &c., were to be taken at a valuation, including the omnibus, &c., as well as certain other articles mentioned. The valuation to commence and be finished on or before the 29th September instant, a lease containing the usual covenants to be prepared and executed by both parties; and that for the due performance of the agreement the parties became bound to each other in \$1000, to be paid by the party in default, as liquidated damages.

The third and fourth counts, after setting out the agreement, averred that all conditions were fulfilled, (except the tender of the lease, which defendant waived by preparing a lease and tendering it to plaintiff for execution, and except the valuation of the furniture and stock of liquors, &c., which defendant hindered and prevented of his own wrong); and that all things happened, &c., to entitle plaintiff to have said agreement performed, and the premises let to him as aforesaid; and the plaintiff has always been ready and willing to perform and has performed his part of the said agreement, yet the defendant did not perform said agreement, nor (as stated in third count) pay the \$1000, nor (as stated in fourth count) let plaintiff into possession.

Held, both counts bad, for among other reasons no breach was specifically alleged; and it appeared that defendant tendered a lease for execution, to which no objection appeared, so that the plaintiff was in default in not executing it.

Fifth plea: that the valuation of the furniture, &c., was not finished on or before the 29th of September, nor yet finished. To which the plaintiff replied that the valuation was prevented and not finished on or before, &c., solely by the acts and misconduct of the defendant.

Held, plea good, as the valuation was a condition precedent to the granting of the lease; and replication bad, as a departure from the declaration.

Sixth plea: that the plaintiff did not tender to the defendant any lease for execution, &c.

Held, bad, as this was not incumbent on the plaintiff, for by the agreement defendant was to give a lease.

Sixth plea: that the plaintiff did not execute the lease when tendered him by defendant. Replication: that the plaintiff was ready and willing to execute the lease when tendered, but was prevented by the acts and misconduct of defendant, &c.

Held, bad, for not shewing how defendant's acts and misconduct hindered and prevented plaintiff executing a lease expressly tendered to him for execution.

DECLARATION. First count: Setting out an agreement dated the 19th September, 1873, between the plaintiff of

the first part, and the defendant of the second part, whereby it was witnessed that Kelly, the defendant, "agrees to give" and Walker, the plaintiff, "agrees to take" a lease, with all the usual covenants, of the premises belonging to said Kelly, on the corner of King and York Streets, in Toronto, at present in his occupation, and known as the "Mansion House," for the term of ten years "from the 29th day of this month, when possession is to be given," and at the rent of \$5,000 per annum. "The license held by the said Kelly to sell liquors, &c., in the hotel, to be transferred at or before possession is given to said Walker, who is to pay a proportionate part of the cost thereof for the unexpired part of the current year. All the furniture now in use in the 'Mansion House' to be taken by said Walker at a valuation, including the omnibus, two horses, harness, baggage waggon, and sleigh, and to include the billiard tables and the furniture thereof. Walker to take the stock of liquors and cigars, also at a valuation." The mode of valuation was then provided for. "This valuation to commence and be finished on or before the 29th September instant. All gas and water pipes, bells, and bell-hangings, and all plumber's work and their connections to be considered fixtures and to go with the premises, also all counters, cupboards, closets, &c., but not to include glass case in dining room, beer pumps and pipes, and heating apparatus in connection with kitchen range, which are to be paid for as furniture, and valued as above. A proper lease to be prepared and executed by both parties, with all the usual stipulations on the part of the landlord and tenant, and particularly to contain covenants by said Walker to pay the rent, as above," &c.; and "for the due and proper performance of this agreement the parties agree to become bound to each other in the sum of \$1,000, to be paid by the party in default as liquidated damages, and not by way of penalty." The declaration then averred that all things happened &c., to entitle the plaintiff to have the said premises let to him for the term in the said agreement mentioned, and to have the said agreement

performed by the said defendant on his part, yet the defendant broke his said agreement, and did not nor would not let the premises to the said plaintiff as aforesaid; and the plaintiff has always been willing to perform his part of the said agreement, and has performed the same, except in so far as he was prevented from so doing by the defendant's breach of the said agreement; and thereupon and thereby the defendant became liable to the plaintiff and ought to have paid to the plaintiff the sum of \$1,000, the amount of damages then incurred and forfeited by the defendant to the plaintiff for his non-performance of the said agreement, yet the defendant did not nor would pay the same.

Second count: setting out the same agreement in substance, and averring that all conditions were fulfilled, &c., to entitle the plaintiff to have the said agreement performed and the premises let to him as aforesaid, and that the plaintiff had always been ready and willing to perform the said agreement on his part, and had performed the same, except in so far as he was prevented from so doing by the defendant's breach of the said agreement, yet the defendant did not perform the said agreement, nor let the said plaintiff into possession of the said premises, whereby, &c.

Third count: also setting out the same agreement in substance, and averring that all conditions were fulfilled, (except the tender of the lease, under the said agreement to the said defendant, which the defendant waived by preparing a lease under the said agreement and tendering it to the plaintiff for execution, and except the valuation of the stock of liquors and cigars, which the defendant hindered and prevented of his own wrong); and all things happened and all times elapsed necessary to entitle the plaintiff to have the said agreement performed and the premises let to him for the said term as aforesaid; and the plaintiff has always been ready and willing to perform the said agreement on his part, and has performed the same, except in so far as he was prevented from so doing by the defendant's breach of the said agreement, and the

defendant has not performed the said agreement on his part, nor has he paid the sum of \$1,000, nor any part thereof.

Fourth count: Setting out the same agreement in substance, and averring that all conditions were fulfilled, (except the tender of the said lease under the said agreement to the said defendant, which the defendant waived by tendering the same to the plaintiff for execution, and except the valuation of the furniture and the stock of liquors and cigars, which the defendant hindered and prevented by his own wrong); and all things happened &c., to entitle the plaintiff to have the said agreement performed and the premises let to him for the said term as aforesaid; and the plaintiff has always been ready and willing to perform his part of the said agreement and has performed the same as aforesaid, except in so far as he was prevented from so doing by the defendant's breach of the said agreement, yet, &c., setting out the same breach as in the second count.

Fifth plea to the whole declaration: that the valuation of the furniture and the stock of liquors and cigars was not finished on or before the said 29th September, 1873, nor has it yet been finished.

Sixth plea, to the first, third, and fourth counts: that the plaintiff did not tender to the defendant for execution any deed or lease, letting the said premises or any of them to the plaintiff.

Seventh plea, to the third, and fourth counts: that the defendant did not waive the tender of the lease under the agreement in said declaration mentioned by tendering the same to the plaintiff for execution, as in said third and fourth counts is alleged.

Eighth plea, to the said third and fourth counts: that the plaintiff did not execute the lease, therein mentioned as having been tendered by the defendant to the plaintiff.

Ninth plea, to the said third and fourth counts: that the defendant did not hinder and prevent the valuation of the furniture, and the stock of liquors and cigars, as therein alleged.

Demurrer, to the third and fourth counts of the declara-

tion: that the plaintiff does not allege that he executed, or was ready and willing to execute the lease in said counts alleged to have been tendered to the defendant by the plaintiff; that the plaintiff does not in any way excuse the non-execution by him of the lease in the said counts alleged to have been tendered to the defendant by the plaintiff.

Demurrer to pleas. To the fifth plea: that the valuation of the furniture and stock of liquors and cigars is not, by the said agreement set forth in the said plea, a condition precedent to the plaintiff's right to sue for breach of the agreement to give a lease of the premises for the term mentioned in the agreement.

To the sixth plea: that under the agreement set out in the first and second counts, and admitted by the defendant's said plea, it is not the duty of the plaintiff to tender to the defendant for execution any deed of lease, letting the premises, or any part thereof, to the plaintiff; that the said plea tenders an immaterial issue.

Second replication to the fifth plea: that the valuation of the furniture and stock of liquors and cigars was prevented and not finished on or before the 29th September, 1873, solely by the acts and misconduct of the defendant, of his own wrong, and without any default on the part of the plaintiff, who was ready and willing that the said valuation should be made at the time and in the manner in the said agreement set forth.

Third replication to the eighth plea: that the plaintiff was ready and willing to execute the said lease when tendered to him by the defendant, as in the third and fourth counts is alleged, but was hindered and prevented from so doing by the acts and misconduct of the defendant acting in his own wrong, and not otherwise.

Demurrer to the second replication to third plea: that the valuation being a condition precedent, the hindrance alleged is not equivalent to, and does not dispense with performance.

Demurrer to replication to eighth plea: that the tender

of a lease by the plaintiff to the defendant being a condition precedent, the hindrance is not equivalent to, and does not dispense with the performance.

Harrison, Q. C., for the plaintiff. The principal question raised by the pleadings is whether the valuation of the furniture is a condition precedent to the property passing and giving the lease. It clearly is not a condition precedent, as it is to ascertain the price, and not to affect the passing of the property: *Port Whitby and Port Perry R. W. Co. v. Dumble*, 22 C. P. 39, 32 U. C. R. 36; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Lockhart v. Pannell*, 22 C. P. 597; *Pordage v. Cole*, Wms. Saund., vol. 1, ed. 1871, 548. At all events it is alleged that the plaintiff was prevented from making the valuation by the hindrance of the defendant; and this clearly dispensed with the condition: *Burroughes v. De Blaquiere*, 34 U. C. R. 498; *Lancashire v. Killingworth*, 1 Ld. Raym. 682; *Pontifex v. Wilkinson*, 1 C. B. 75; *Jones v. Barkley*, 2 Doug. 684; *Smith v. Wilson*, 8 East 437; *Doughty v. Neal*, Wms. Saund., vol. i, ed. 1871, 236. As to the question of tender. There was no necessity for the plaintiff to execute the lease, and tender it for execution to defendant; but it was the duty of the defendant to make and execute the lease. The very words of the agreement, "Kelly agrees to give, and Walker to take, a lease," shew this. It is the same as in bonds, where the obligor binds himself, within a certain time, to convey an estate to the obligee; he must *himself* prepare the conveyance, and tender it executed to the obligee: *Mouck v. Stuart*, 4 U. C. R. 203; *Prindle v. M'Can*, 4 U. C. R. 228; *M'Donald v. Snitsinger*, 5 U. C. R. 312; *Pincke v. Curteis*, 4 Brown C. C. 328. The defendant, however, waived a tender by executing the lease and tendering it to plaintiff; and if it is necessary for plaintiff to execute it, he has done so: *Brymer v. Thames Haven Dock and R. W. Co.*, 2 Ex. 549, in error, 5 Ex. 696; *Laird v. Pim*, 7 M. & W. 474; *Clark v. M'Kay*, 32 U. C. R. 583; *Mooney v. Prevost*, 20 Grant 418. It is not necessary,

however, that the plaintiff should have executed the lease : *Bentley v. Dawes*, 9 Ex. 666.

Patterson, Q. C., contra. The whole agreement must be looked at; and it clearly shews that the furniture, &c., was to be valued before the defendant could be compelled to give a lease. The valuation is to be finished on or before the 29th September; and it is a condition precedent to the property passing, and is not merely to ascertain the price. The whole object of the defendant was to transfer the hotel as a running concern; and if he were compelled to execute a lease, without the valuation taking place, and the furniture going with the hotel, his whole object would be defeated. The plaintiff, should have tendered the lease to the defendant. As to the allegation that the defendant waived the tender by himself tendering it, the plaintiff should have alleged that, when tendered to him, he executed it.

GWYNNE, J.—The demurrer to the third and fourth counts of the declaration must be allowed.

It is difficult to ascertain what is the breach alleged in respect of which the plaintiff claims to be entitled to recover: namely, whether it was for not giving the lease to the defendant, or for having hindered and prevented the valuation being made; neither of these causes are specifically alleged as breaches, and we do not think that we can regard the averment in general terms, that “the said defendant has not performed the said agreement upon his part, nor has he paid the said sum of \$1,000, or any part thereof,” as a sufficient averment of a breach.

The only modes in which the defendant, as it seems, could commit a breach of the agreement, were, by not giving the lease, or not letting the plaintiff have the furniture, &c., at the valuation appraised, in the manner agreed upon; or by hindering and preventing the valuation taking place at all.

Now the plaintiff—treating, (whether rightly or wrongly

it matters not for the present enquiry), both the preparation of the lease and its tender by him to the defendant for execution, and the valuation of the stock of liquors and cigars, as conditions precedent necessary to be performed or waived, and non-performance excused, to entitle him to the fulfilment of the contract, for the breach of which he sues in this count,—alleges that all conditions precedent were performed, except those two, as to the first of which he says the defendant waived the performance thereof by the plaintiff by preparing the lease himself and tendering it to the plaintiff for execution; and as to the other condition precedent, that the defendant hindered its fulfilment by his own wrong. And so, as I understand the count, the plaintiff claims to have been entitled to the lease; but he has already averred that the defendant prepared and tendered to the plaintiff for execution a lease, as to the terms of which no objection appears to be taken, and which we must take, therefore, to have been a proper lease. The count, then, seems to shew the plaintiff himself to have been the person in default in not executing the lease, which, in the terms of the agreement, was to be, and of necessity had to be, executed by the plaintiff, as well as the defendant.

If, in fact, the defendant did hinder and prevent the valuation of the liquors and cigars, that might give a cause of action as a breach of the agreement; but the count, as framed, goes for no such cause of action. The averment, also, of the plaintiff's readiness and willingness to perform the said agreement upon his part, except in so far as he was hindered and prevented from so doing by the defendant's breach of the said agreement, is an insufficient averment of the plaintiff's readiness to perform concurrent acts: *London Dock Company v. Sinnott*, 8 E. & B. 347. The more so as in this case we see no well alleged breach of the agreement on defendant's part which could have the effect of hindering and preventing the plaintiff performing the agreement upon his part.

In the fourth count the breach is a little more clearly

alleged, and it is stated to be that "the defendant did not let the plaintiff into possession of the said premises;" but from what is alleged in this count, we must assume that the plaintiff refused to execute the lease when tendered to him for execution by the defendant; and the plaintiff was not to have possession except under a lease, which was to contain clauses, covenants, and agreements, in respect of which the plaintiff was to be actor, and which lease was therefore to be executed by the plaintiff.

These counts are also bad, for reasons which will appear on discussion of the demurrer to the fifth plea.

The replication to the eighth plea, which is also demurred to, we think is also clearly bad. It is difficult to understand what is meant by the vague allegation that the defendant's acts and misconduct hindered and prevented the plaintiff from executing a lease tendered to him by the defendant for the express purpose of being executed.

Then the fifth and sixth pleas are demurred to, and the replication to the fifth plea.

The fifth plea is to the whole declaration, and therefore applies to the first and second counts, which were not demurred to, and is to the effect that the valuation of the furniture and the stock of liquors and cigars was not finished on or before the said 29th day of September, 1873, nor has it yet been finished.

The replication to this plea is in substance that the valuation was prevented and not finished on or before the 29th of September, 1873, solely by the acts and misconduct of the defendant, of his own wrong, and without any default on the part of the plaintiff, who was ready and willing that the said valuation should be made at the time and in the manner in the said agreement set forth.

These pleadings raise the main question argued before us, namely, whether the valuation was a condition precedent to the granting of the lease.

The breach in the first count is, that the defendant did not nor would let the premises to the plaintiff as aforesaid;

and in the second count that the defendant did not let the plaintiff into possession of the said premises.

In *Stavers v. Curling*, 3 Bing. N. C. 355, Tindal, C. J., says, at page 368: "The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way."

And in *Roberts v. Brett*, 6 C. B. N. S. 611, Bramwell, B., says, at page 633: "Wherever the obvious good sense of the thing makes the performance of an act a condition precedent, it ought to be so construed. * * I entirely agree, he says, that we are to ascertain the intention of the parties. The rules laid down in the notes to *Portage v. Cole*, 1 Wm. Saund. 320, are very excellent guides, but not arbitrary tests.

Now according to the obvious good sense of the thing, it appears very clear to me that the intention of the parties was that the Mansion House should be transferred from Kelly to Walker as a going concern, to be occupied as an hotel with all its furniture and stock of liquors, &c., the passing of which was necessary for the complete enjoyment of the house as an hotel; that Kelly never contemplated leasing the house, except upon the terms that Walker should take the furniture, stock of liquors, &c., at a valuation to be made as provided by the agreement. Kelly, in fact, agrees to give a lease of the house and premises to Walker, he taking the furniture, stock of liquors, and other things at a valuation, and paying for them at the prices to be determined by the valuation.

All those articles, to be valued, were to go with the house, but were to be purchased by Walker at the price determined by the valuation.

This appears to me to be the very plain meaning of the agreement.

The agreement provides that the license to sell spirituous

liquors in the hotel is to be transferred *at or before* possession is given to Walker, plainly for the purpose that from the moment of his entry the license may operate to enable him to sell liquors in the hotel, the stock of which, already supplied for use in the hotel, he agrees to take at a valuation. Then it provides that Walker shall take "all the furniture now in use in the Mansion House," that is, as it seems very clear to me, the furniture in the places where it is in use, for example, the carpets on the floors, such furniture to include the omnibus and two horses, and the baggage wagon, and sleigh required for the use of the hotel, and the stock of liquors in the cellars, and cigars; also the glass case in the dining room, the beer pumps and pipes, and heating apparatus in connection with the kitchen range are all to be taken at a valuation and paid for, and to go with the hotel. And it is expressly provided that the valuation shall *be finished on or before* the day named for the giving the lease. Then all these things being provided for, the agreement concludes by saying that a lease is to be prepared and executed by both parties.

This agreement provides, as plainly as words can, that the valuation of the things which Walker is to take with the hotel, and which were necessary for the keeping of the hotel, should be completed *before* or at latest *on* the day named for the giving of the lease. There appears no intention that Walker should have the hotel, except conditional upon his taking the furniture, which, although to be purchased by Walker, were to remain *in loco* in the hotel, and to go to him with the hotel.

To hold that the defendant rested on his remedy under the agreement for the purchase of the furniture, stock of liquors, and heating apparatus in connection with the kitchen range, would be, as it seems to me, to defeat the whole object and intention of Kelly in parting with the hotel; and I am therefore of opinion that whatever cause of action the plaintiff may have to recover the \$1,000 mentioned in the agreement for the defendant preventing the valuation taking place, if he did prevent it, he could not claim an execu-

tion of the lease until the valuation, which I take to be a clear condition precedent, should be made, and the plaintiff should be ready to pay the price appraised concurrently with the execution of the lease.

The judgment therefore must be for the defendant on the demurrer to the fifth plea, and on the demurrer to the replication to that plea, the replication stating a cause of action for preventing the valuation, which is quite different from the breach set out in the counts for not letting the premises and giving possession thereof.

Upon the authority of *Mouck v. Stuart*, 4 U. C. R. 203 ; *Prindle v. M'Can*, 4 U. C. R. 228, I am of opinion that it was not incumbent upon the plaintiff Walker to prepare the lease and tender it for execution. The defendant was to "give" the lease.

Judgment therefore should be for the plaintiff on the demurrer to the sixth plea.

HAGARTY, C. J.—We are not embarrassed in this case by the fact of an agreement partly performed, and to which it is sought to object that a dependent covenant or condition precedent has not been performed. Everything here is executory. The parties agree that a lease shall be given and accepted with the usual covenants, for a term to commence at a future day named. A large hotel in full business is the subject matter. The incoming tenant is to take and pay for the whole of the furniture and vehicles, &c., used in the business, at a valuation, which is to be made and finished by the same day named for the commencement of the term.

I agree with my brother Gwynne that we cannot separate these two chief stipulations, and possibly thus defeat the main object of the landlord, and destroy, perhaps, the main consideration for his entering into it.

This Court had occasion to consider this question very fully in *Coatsworth v. City of Toronto*, 10 C. P. 76 ; and many cases are noticed besides those cited herein.

In *Croockewit v. Fletcher*, 1 H. & N. 893, it is said, at

page 911, "All mercantile contracts" (on a question of condition precedent) "ought to be construed according to their plain meaning to men of sense and understanding, and not according to forced and refined constructions which are intelligible only to lawyers, and scarcely to them."

In *Tarrabochia v. Hickie*, 1 H. & N. 183, it is said, at page 188 "No doubt it is competent for the parties, if they think fit, to declare in express terms that any matter shall be a condition precedent, but when they have not so expressed themselves, it is necessary for those who construe the instrument to see whether they intended to do it."

In *Morton v. Lamb*, 7 T. R. 125, Lord Kenyon says, at page 130, "Whether covenants be or be not independent of each other, must depend on the good sense of the case, and on the order in which the several things are to be done."

In the case above cited of *Tarrabochia v. Hickie*, it was held that the stipulation in a charter party, that the vessel being tight, staunch, and strong, and should sail with all convenient speed, were not conditions precedent to the charterers' obligation to load, unless by the breach of such stipulations the object of the voyage was wholly frustrated.

The plea averred that she was not staunch, &c., as required, and by reason thereof the object of the charter-party and of the voyage was wholly frustrated.

At the trial the jury found that she was not staunch, &c., but that the object of the voyage was not thereby frustrated.

The Court considered that it was not a condition precedent, and that the jury had negatived the material averment.

I have no doubt but that the parties to this contract clearly meant that the valuing and payment for the furniture, &c., by the defendant, was an essential of the whole bargain, and that the landlord especially would be amazed if told that, although the plaintiff must have the lease, he need not value or pay for the furniture, or that the only remedy against him would be an action for damages.

I cannot help expressing my great regret that such a mass of writing as this collection of counts, pleas, replications, and demurrers should be laid before us, drawn with such wonderful vagueness and looseness of statement that it is impossible to do anything but conjecture what the real dispute is between the parties, or what has in truth caused the difference between them or prevented the performance of the contract.

The statements about the preparation and tender of the lease are peculiarly open to unfavourable remark, and no system of pleading should tolerate such word play.

GALT, J., concurred.

Judgment accordingly.

GILMOUR ET AL. V. BUCK.

Timber license—Renewal of—Timber cut on limits taken by wrongdoer—Replevin—Identity of logs.

The plaintiffs were in possession of certain timber limits under a license from the Crown which expired in April, 1872, but it was the practice of the Crown Lands Department to recognize the right of licensees to a renewal, and a renewal was granted to the plaintiffs for 1872-73, and the ground rent paid in advance, the plaintiffs remaining in possession. In consequence, however, of some difficulty about the boundaries, the license did not issue until the 5th of April, 1873, but it was stated to cover the period between the 20th of June previous. During this period, certain persons, under whom defendant claimed, entered upon the land and cut a quantity of saw logs; and on the plaintiffs going to where they were lying in a creek or river on their limit for the purpose of marking them, they were forcibly prevented by defendant, who opened an artificial dam and caused the logs to be floated down the river where they got mixed with some of defendant's logs. The plaintiff then went to where the logs were, and selected the logs in question being of the same size and description as his own logs, and marked them.

Held, that the plaintiff might maintain replevin: that there was sufficient evidence of identity; and that at all events as the defendant's own wrongful act was the cause of any difficulty he could not object on this ground.

The plaintiffs being in possession, though they might have no title as against the Crown, could maintain replevin against a wrongdoer.

THIS was an action of replevin, brought to ascertain the right to a quantity of saw-logs claimed by the defendant, and which had been replevied by the plaintiffs.

The cause was tried before Wilson, J., without a jury, at Belleville, at the Fall Assizes of 1874.

It appeared the plaintiffs were licensees of certain timber limits, and it was admitted at the trial that the logs in question had been cut on land embraced within these limits by persons under whom the defendant claimed, without any authority.

It was proved that the plaintiffs had held this license for some years before the date when the logs were cut and seized, and up to the present time.

It appeared that in consequence of some re-arrangement of the Ottawa and Ontario agencies for Crown Lands, the license which the plaintiff had held for some years before the 20th May, 1871, and which, according to its terms, expired on 30th April, 1872, was not renewed until the 5th April, 1873, and was then stated to be from the 29th June, 1872, until the 30th April, 1873, and the ground rent had been paid for the whole year on 3rd May, 1872.

The logs in question were cut in the winter of 1872-73, and remained on the land on which they were cut until April, 1873; and, according to the evidence of a witness named Bain, they were there on the 18th April, on which day he had gone to mark the logs as belonging to the plaintiffs, but was prevented by the defendant's men.

The license granted to the plaintiffs was under the provisions of the Consol. Stat. C. ch. 23; by the 2nd section of which it is enacted that—"The said licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being on the nominee the right to take and keep exclusive possession of the lands so described, subject to such regulations and restrictions as may be established; and such licenses shall vest in the holders thereof all rights of property whatsoever in all trees, timber and lumber cut within the limits of the license during the term thereof, whether such trees, timber and lumber are cut by the authority of the holder of such license, or by any other person, with or without his consent; and such licenses shall entitle the holders thereof to seize in revendication, or

otherwise, such trees, timber or lumber where the same found in the possession of any unauthorized person, and also to institute any action or suit at law or equity against any wrongful possessor or trespassers, and to prosecute all trespassers and other offenders to punishment, and to recover damages, if any."

In the license there is a clause as follows: "And by virtue of this license the said licensee has the right, by the said Provincial statute, to all timber cut by others during the term of this license in trespass on the ground hereby assigned, with full power to seize and recover the same anywhere within the Province."

The evidence of Mr. Way, the Crown timber agent, shewed the practice of the department with respect to licenses. He stated—"These two licenses (referring to the licenses to the plaintiffs for the years 1872-73, and 1873-74), are signed by me; the third (that is the one for 1871-72), by A. J. Russell, Crown Timber agent, Ottawa." (These three licenses included the lots on which the logs were cut.) "The timber limit was in Mr. Russell's agency formerly. It has now been for two years in my agency, and the licenses have since been issued by me. The dues were levied on the 3rd May, 1872. The licenses usually expire on the 30th April of each year. The ground rents are usually paid in advance, but not the dues. On paying the ground rent the licensee is entitled to the license. The license usually begins from that payment. The license of 5th April, 1873, which runs from the 29th June 1872, till the 30th April, 1873," (this was the license in question), would have issued sooner, but the Government were getting the limits between plaintiffs and Rathburn & Co. properly settled. Mr. Cooper of Toronto, myself, and Mr. Russell met at Ottawa, two years ago last June, to re-arrange the boundary between the Ottawa Agency and the Ontario Agency—that is, between Mr. Russell's agency and mine. The lands in the license above mentioned were all formerly in Mr. Russell's Ottawa agency, and by the re-arrangement made, as before stated, the whole of these lands came to be

within my agency, and the license would have issued before the 5th April, 1873, if it had not been for the delay occasioned in making the division of the lots between the plaintiffs and Rathburn & Co, in their respective limits, in describing their lands. On the re-arrangement of our agencies, the parties were recognized by us as entitled to their licenses from May, 1872, though they had not in fact issued. The right to cut timber depends on the Crown license. A license issues for each year. Sometimes they are withdrawn. The arrangement between Rathburn & Co. has been perfected. I renew licenses from year to year without special instructions from the Department. It appears I received special instructions to make the license of 5th April, 1873, refer back to 29th June, 1872. The ground rent for the plaintiffs' limit was paid by them on 3rd May, 1872, and the license would have issued then if it had not been for the trouble in settling the limits between the plaintiffs and Rathburn & Co., consequent on the re-arrangement of my agency or district."

On re-examination he stated—"The licensee is obliged to pay duties for all timber cut on his territory, no matter who cuts it; and it is not the practice for the Crown or the agents to receive dues on timber cut by a trespasser on limits."

It was proved that after the logs had been cut the agent for the plaintiff went to the place where they were lying, for the purpose of marking them, but was forcibly prevented by the servants of the defendant; that at that time the logs were in the river or creek, situate on lot 11, and that to prevent the plaintiffs' agent from marking the logs, and for the purpose of removing them, the servants of the defendant opened an artificial dam, which had been constructed on this river, and allowed the water to escape, the effect of which was that the logs in question were floated down and mixed with a large number of other logs belonging to the defendants. This took place after the license had issued. The servants of the plaintiffs then proceeded to where the whole of the logs were stopped

by a boom, and selected the logs now in question, being of the same size and description as those taken, and marked them, after which the writ of replevin was sued out, and the sheriff delivered to the plaintiffs the logs so marked, and this action was brought.

The learned Judge found that the plaintiffs were in possession at the time the trespass was committed, although the license had not actually issued, and entered a verdict for the plaintiffs.

In Michaelmas Term, *Bethune* obtained a rule *nisi*, to set aside the verdict entered for the plaintiffs, and to enter a verdict for the defendant, on the following grounds—1. That the plaintiffs did not prove any title whatever to the logs mentioned in the writ of replevin so as to entitle them to a verdict. 2. That the plaintiffs did not give any evidence of the identity of the timber taken by the sheriff under the writ, with the timber to which the plaintiffs may have been entitled, if any such there was; or why a new trial should not be had between the parties, on the ground of the discovery of further evidence shewing that payment of the ground rent was not made until after the issue of the writ in this cause; and on affidavits.

Bell, Q. C., Belleville, shewed cause. The evidence shews that the plaintiffs were licensees up to April, 1872, and that in consequence of some re-arrangement made between the Dominion and the Ontario governments, the license was not renewed until the 5th of April 1873, but it was stated to be from the 29th of June previous, and the ground rent had been paid on the 3rd May, 1872. The logs were cut during the winter of 1872–3, and therefore during the currency of the license, and therefore the plaintiffs had a perfect right to take them. The defendant was a mere wrongdoer, and the plaintiffs as being in possession could maintain trespass or trover against him, and therefore replevin: *Graham v. Heenan*, 20 C. P. 340; *McDonald v. Bonfield*; 20 C. P. 73; *Harper v. Charlesworth*, 4 B. & C. 574; *Alexander v. Bird*, 8 C. P. 539; *Henderson v. McLean*, 8 C. P. 42; *McMullen v. McDonald*, 27 U. C. R. 40.

Bethune, contra. The rights of the plaintiffs depend upon the Consol. Stat. C. ch. 23. Sec. 1 shews that the license can be granted for no longer period than twelve months; and sec. 2 shews that the rights of the licensee can only be exercised during the currency of the license. It is shewn that the logs were cut after the 30th April, 1872, when the license had expired, and the affidavits shew that the ground rent was not paid until the 6th May, 1873; and although the license subsequently granted is said to include them, yet the Crown agent had no power to make the license from the prior date, and it is therefore bad. At all events as the logs were severed before the license issued they were goods and chattels, and no property in them passed to the plaintiffs under the license so as to enable the plaintiffs to maintain this action: *Chitty* on Perogatives, 99.

GALT, J., delivered the judgment of the Court.

There were two points taken by Mr. Bethune in support of his first objection. 1. That the logs were cut before the license issued, and therefore, as they were not cut during "the term thereof," the plaintiff had no right to seize them. 2. That the logs having been severed before the license issued were goods and chattels, and that the property in them did not pass to the plaintiffs under the license so as to enable them to maintain this action in which the right of property is involved. In support of this contention he treated that clause in the license referring back to 29th June, 1872, as inoperative and void.

Before considering these objections it may be as well to dispose of that portion of the rule referring to the discovery of new evidence as to the date of payment of the ground rent, as it has a bearing on this point. The fact is that Mr. Flint has made a mistake in his affidavit, when he states that the ground rent for 1873 was paid on the 6th May, 1873. It was payable in advance, and had been paid on 3rd May, 1872.

By sec. 1, sub-sec. 2 of Consol. Stat. C., the "Act respecting

the sale and management of Timber on Public Lands," it is enacted that "no license shall be granted for a longer period than twelve months from the date thereof;" but it was shewn by Mr. Way that it is the practice of the department to recognize the rights of persons to obtain a renewal of their licenses. In the present case the plaintiffs were licensees in 1871-72, and their right to renewal was admitted, and the Government received the ground rent for the year 1872-73 in May, 1872, although the license, owing to the cause stated by Mr. Way, did not actually issue until April, 1873. The plaintiffs then were in possession with the sanction of the Crown, and had actually paid the ground rent when the timber was cut. The plaintiffs had applied for a renewal of their previously existing license, which application had been granted, and the rent payable by them had been received, and the only reason why the license had not issued was on account of a difficulty about boundaries. It was clearly proved that the parties who cut these logs knew that they were cut on the limits of the plaintiffs' and before the defendant purchased them he was warned not to buy them, as they had been so cut.

The case of *Harper v. Charlesworth*, 4 B. & C. 574, shews that a person in possession of Crown Lands, although his title may be void as against the Crown, may maintain an action of trespass for breaking and entering the land against a wrong-doer.

The Court in that case adopted and approved of the decision in *Johnson v. Barrett*, Alleyne 6, which was an action of trespass for carrying away soil and timber, &c.

Upon the trial it was argued that an intruder upon the King's possession might have an action of trespass against a stranger, but he could not maintain ejectment.

In the case before us the plaintiffs were in possession, and at the time when the timber was actually taken away were under the license that had issued on the 5th of April.

The learned Judge at the trial found that the plaintiffs were in possession at the time the trespass was committed, although the license had not actually issued.

It has been decided in this Court by the cases of *McDonald v. Bonfield*, 20 C. P. 73, and *Graham v. Heenan*, in the same volume, p. 340, that this defendant could not have maintained trover against these plaintiffs, had the plaintiffs seized the logs.

As it appears by the authority of *Johnson v. Barrett*, that even an intruder upon the king's possession can maintain trespass against a stranger for taking away timber, it is unnecessary to consider whether the license to the plaintiffs could have reference back to the 29th June, 1872, for it is plain that they were lawfully in possession of the land where the logs were lying at the time when the defendants removed them; and as, according to the authorities cited in *Harper v. Charlesworth*, they were responsible to the Crown for any timber removed while they were so in possession, they could certainly maintain trespass against any wrong-doer for taking it away, and consequently under the provisions of the Act allowing replevin to be brought where trespass or trover was maintainable, they had a sufficient property in these logs to enable them to maintain the action against a wrong-doer.

Then as regards the identity of the logs. The evidence is perfectly distinct that the defendant wrongfully and by force took possession of these logs and removed them with a number of other logs, and that the plaintiffs did their best to select logs of the same size and description as those so taken, nor is there any suggestion that the plaintiffs acted unfairly in so doing. Any difficulty that arose was occasioned by the wrongful act of the defendant, and he is not in a position to complain of what was done.

When we consider the large amount of transactions in this description of business, and that there are many men employed in them, and that they are carried on at a distance from any magisterial authority, we think that no encouragement or countenance should be given to any act of injustice; and that if any loss is sustained or difficulty experienced by the persons guilty of unlawful conduct, they have no reason to expect that any court of law

will be astute to shield them from the result of their own improper conduct.

Rule discharged.

ARCHER V. KILTON.

Ejectment—Question of boundary—Description of land.

The plaintiff in ejectment described the land claimed by him as that part of lot 24 comprised within these limits: commencing at the south westerly corner of lot 24, then north, parallel with town line, 20 feet; then easterly parallel with the southerly limit of said lot to town line, then southerly along said line to the southerly limit of said lot 24, then westerly along said southerly limit to the place of beginning. Defendant appeared and limited his defence to the land described as, commencing at the north easterly corner of lot 25; thence southerly along the easterly boundary of said lot, 20 feet to a point; thence westerly, at right angles to said boundary, to a point on the western boundary of said lot 25; thence northerly along said boundary 20 feet to a point on the boundary line between lots 24 and 25; thence easterly along said last mentioned boundary line to the place of beginning; "and which is sought to be recovered in this action as being part of lot 24." Lot 24 adjoined and lay to the north of lot 25. It was admitted at the trial that the plaintiff was entitled to the south half of 24 and defendant to the north half of 25, and the learned Judge thereupon held that there was nothing to try, and entered a verdict for the plaintiff; but *Held*, that the question of the true position of the boundary line between the lots was substantially raised, and should have been tried.

THE plaintiff brought ejectment for that portion of the south side of lot No. 24, in the 17th concession of the township of Goderich, comprised within the following limits: "Commencing at the south-westerly corner of said lot 24; thence north, parallel with the division line between the townships of Goderich and Hullett, twenty feet; thence easterly, parallel with the southerly limit of the said lot 24, to the said division line between the said townships of Goderich and Hullett; thence southerly, along the said division line, to the southerly limit of the said lot 24; thence westerly, along the said southerly limit, to the place of beginning."

The defendant appeared and limited his defence to the land and premises more particularly described as follows: "Commencing at the north-easterly corner of lot No. 25 in

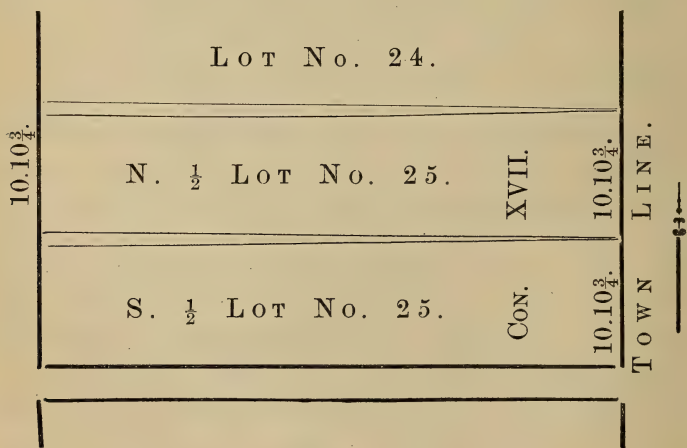
the 17th concession of the township of Goderich; thence southerly, along the easterly boundary of the said lot, twenty feet, to a point; thence westerly, at right angles to the said easterly boundary line, to a point on the western boundary line of the said lot 25; thence northerly along said westerly boundary line, twenty feet, to a point on the boundary line between lots 24 and 25, in the said concession; thence easterly, along said last mentioned boundary line, to the place of beginning; and which is sought to be recovered in this action as being part of lot No. 24 in the said 17th concession.

The cause was tried before Morrison, J., without a jury, at Goderich, at the Spring Assizes of 1874.

It was admitted that the plaintiff was entitled to the south half of lot No. 24, and the defendant to the north half of lot No. 25, in the 17th concession.

The question really in dispute was the true position of the south-west angle of lot No. 24, which was also the north-west angle of lot 25.

The following map was put in to shew the position of the lots:—



A surveyor was called by the defendant, and, on being asked to read the description in the writ, said that no part of the land in the writ could be part of lot No. 25.

The learned Judge, thereupon, being of opinion that there was nothing to try, rendered a verdict for the plaintiff.

In this term *S. Richards*, Q. C., obtained a rule *nisi* to set aside this verdict, upon the grounds: 1. That there was a point to be tried, namely, the position of the boundary line between lots Nos. 24 and 25; and 2. That if there was nothing to try, the plaintiff should not have taken the case down to trial.

In the same term *Robinson*, Q. C., shewed cause. It is evident, upon looking at the different descriptions, that the description given in the plaintiff's writ cannot properly include any part of lot 25, as the surveyor called by the defendant had to admit; for it begins at the south west corner of that lot, that is the true south west corner wherever that may be, and runs 20 feet into the lot; and the description in defendant's notice of title can cover no part of lot 24. When the plaintiff's title to lot 24 was admitted there was therefore nothing to try; and the verdict for the plaintiff was right. A question of boundary may be tried in ejectment, but the land in dispute must be so described that by the description it can be determined and laid out upon the ground without reference to the boundary in question, and it will be found that in the cases reported it thus appeared what the piece in dispute was: *Irwin v. Sagor*, 21 U. C. R. 373; *Sexton v. Paxton*, 21 U. C. R. 389, 389 note; *Boules v. Taughney*, 21 U. C. R. 391; *Lund v. Savage*, 12 C. P. 143; *Sexton v. Paxton*, 2 E. & A. 219. It is contended by defendant that if there was nothing to try, the plaintiff should not have gone down to trial; but the mere fact of defendant entering an appearance and defending, compelled the plaintiff to go down to trial and prove his title, and on doing so he was entitled to have a verdict entered in his favour: *Lund v. Savage*, 12 C. P. 143; *Canada Co. v. Weir*, 7 C. P. 341; *Fairman v. White*, 24 U. C. R. 123; *Shore v. McCabe*, 10 C. P. 26; *Burk v. Battle*, 17 C. P. 478.

S. Richards, Q. C., contra. The object of the suit is to try the boundary between lots 24 and 25. The defendant claims a piece of land as part of 25, and the plaintiff says it is part of 24, and, looking at the description, it appears that the part described by the defendant as part of 25 covers the piece described by the plaintiff as part of lot 24; and, therefore, there was clearly a question to be tried, viz.: whether the piece in dispute formed part of 24 or 25, and the question is raised just as clearly as in any of the cases referred to by the other side. If, however, as contended by the plaintiff, the defendant's notice of title was insufficient, and there was therefore no question to try, he should have applied under sec. 12 to have it amended, and not put defendant to the expense of a trial.

GWYNNE, J., delivered the judgment of the Court.

We are of opinion that this rule must be made absolute. The plaintiff brings his action for a piece of land which he describes by metes and bounds, commencing at a point which he calls the south-west angle of lot No. 24, and which piece of land the plaintiff says is part of lot No. 24, and if the point on the ground from which he starts be the true south-west angle of lot No. 24, the piece he claims is no doubt part of lot 24; but this is the very point in dispute, the defendant claiming that the point on the ground from which the plaintiff starts is not the south-west angle of lot 24, but is about twelve or twenty feet further south than that point, and is in fact in lot 25. The defendant, therefore, limits his defence to a piece of land, which he describes by metes and bounds, and instead of commencing, as the plaintiff had done, from what may be called the unknown point, namely, that which is in dispute, he commences from the north-east angle of lot 25, which is the south-east angle of lot 24, and which is a fixed point upon the ground, as appears by the map produced and the evidence of the surveyor, about which there is no dispute whatever, and going south twenty feet along the eastern boundary; then at right angles with the eastern boundary

to the western boundary line, (where he reaches upon the ground the point from which in fact the plaintiff started, wrongly, as the defendant contends, calling it the south-west angle of lot 24); thence north, twenty feet, along the western boundary to a point, which the defendant says is the true south west angle of lot No. 24, and thence easterly to the place of beginning. And the defendant asserts that this piece of land, so described by him, is the piece of land which the plaintiff brings his action to recover, wrongly, as the defendant says, calling it part of lot 24, when it is in fact, as the defendant contends, part of lot No. 25.

Looking at the map put in evidence, it is apparent that the piece described by the defendant does in fact cover the piece which the plaintiff claims as part of lot 24; and there would have been no difficulty whatever if the defendant had left out of his description mention of "the boundary line between lots 24 and 25 in the said concession," but he has, as it appears to us, offered a very plain issue to be tried, namely, that in truth and in fact the piece of land within his description, which consists of a parallelogram, described south of and commencing from the known point, namely, the north-east angle of lot 25, and lying between the eastern and western limits of lots 24 and 25, covers the piece of land claimed by the plaintiff, and which the plaintiff alleges is part of lot 24, and the defendant that it is part of 25.

We see by the map, as explained by the evidence of the surveyor, that the plaintiff does not claim all the land described by the defendant, for the piece in dispute appears to have only a base of twelve or twenty feet on the western limit, running to a point at the undisputed north-east angle of lot 25; but the question of the true position of the boundary line between the lots is substantially raised, as it may be in ejectment, upon the authority of *Sexton v. Paxton*, 2 E. & A. 219.

There must, therefore, be a new trial, without costs.

Rule absolute.

TAYLOR V. THE COBOURG, PETERBOROUGH, AND MARMORA
RAILWAY AND MINING COMPANY.

*Commission on sales—Contract for—Construction of—Managing director—
Powers of—16 Vic. ch. 253, secs. 10, 17, 20.*

The defendants wishing to introduce an ore called blue ore into Pennsylvania, corresponded with the plaintiff at Pittsburg. Through the plaintiff's intervention an agreement was made between O. & Co. and defendants for the sale of 15,000 tons, to be delivered before the 1st of August, 1872, with an option to O. & Co. to order any number of tons, from 10,000 to 30,000, during the five years from the 1st of February, 1873, and a formal contract was subsequently executed. On the above sale being effected, C., defendants' managing director, wrote plaintiff that a commission of 15 cents per ton would be paid him on that sale, and that he would make him the following offer for the future: "I will give you a commission of 10 cents per ton for all ore introduced to any furnace, that is, for the first sale made to any furnace; and a commission of 5 cents per ton for all blue ore for the years 1873, 4, 5, 6, 7, that is, for five years from the 1st of January, 1873; and I make you the sole agent for the sale of blue ore for Western Pennsylvania." The defendants paid plaintiff the 15 cents on the 15,000 tons; but O. & Co. having exercised their option, and ordered the 30,000 tons, plaintiff claimed that he was entitled to a commission of 5 cents per ton on this 30,000 tons, and brought this action therefor.

Held, that he could not recover, as the agreement to give 5 cents per ton on all sales during the five years, referred to future sales, and not to any amount ordered by O. & Co. under their contract.

Held, also, that proof merely that C. was defendants' managing director was not sufficient evidence under 16 Vic. ch. 253, secs 10, 20, of C.'s authority to enter into the contract with plaintiff; but it should have been shewn that his act was in accordance with the powers conferred on him.

Held, also, that plaintiff was not an agent within sec. 17, so as to require his appointment by by-law.

DECLARATION. First count: that the defendants by memorandum in writing appointed the plaintiff their agent, for the sale of blue ore, and promised him a commission of five cents per ton, sold or procured to be sold by him, for the year 1873; that he procured 30,000 tons to be sold to a firm called Owens & Co., deliverable in 1873, &c. Breach, non-payment. The common counts were added.

Pleas to first count: 1. Non-assumpsit. 2. That the plaintiff did not sell, &c.

To the common counts: never indebted, and payment.

The cause was tried before Hagarty, C. J., without a jury, at Toronto, at the Spring Assizes of 1874.

The plaintiff deposed that he was a civil and mining engineer, and resided in the city of Pittsburg in the State of Pennsylvania. He knew Mr. Chamblis, defendants' Managing Director. He was the Managing Director of the defendants, and lived at Cobourg, where the head office was. The defendants had an ore, called blue ore, which they wished to introduce to public use; and a correspondence took place between the plaintiff and Chamblis as to its introduction to Western Pennsylvania. A letter was produced, dated 9th January, 1872, signed by Chamblis, addressed to the plaintiff: "I will sell or permit you to sell from 10 to 15,000 tons of the blue, for \$6.35 per ton, delivered at Erie or Cleveland, lake freight and duty cash, balance in four months' notes, to be given at end of each month. I will allow you 15c. per ton on all sales made. This is the commission I have paid to parties at Cleveland. The sales would have to be made by 16th February or 1st March, at the outside, to give me time to get the ore out."

This was written to the plaintiff at Pittsburg, in answer to his enquiries as to the price of the ore. He had spoken to Owens & Co., a large firm in Pittsburg, respecting the blue ore.

The plaintiff again saw Owens, who made objections.

About the 1st February, 1872, the plaintiff and Owens went to Cobourg and saw Chamblis.

Owens was examined on commission.

At Cobourg he agreed with the defendants for the future delivery of blue ore, subject to the approval of his co-partners at Pittsburg. On his return, and with their assent, a contract was executed, dated 7th March, 1872, by which the defendants agreed to furnish 15,000 tons, between that date and the 1st August following, at \$5.50.

It also provided that if Owens & Co. gave notice by 1st February, 1873, to that effect, the defendants, for five years after February 1st, 1873, would deliver any number of tons from 10,000 to 30,000, as Owens & Co. might order each year, price \$6.00.

The agreement declared that its effect was an absolute sale of 15,000 tons in 1872, and an option to Owens & Co. to have the other quantities during the ensuing five years.

This agreement was in substance concluded in Cobourg.

The plaintiff said that at the Cobourg negotiation Chamblis told him the contract was assuming a different shape from what he anticipated; that he would pay the plaintiff 15c. commission on the 15,000 tons, then talked of by Owens, and 5c. per ton on the balance of the contract, whatever might be ordered.

The plaintiff said the bargain was made finally, as in Chamblis's letter, (produced), dated February 19, 1872, written to the plaintiff after he and Owens had been in Cobourg.

The letter was as follows:—

“Cobourg, Peterborough, and Marmora Railway
and Mining Company.

“Cobourg, Canada, February 19, 1872.

“P. D. TAYLOR, C. E.

“Sir,—

“In reply to your enquiry I have the honour to state: A commission of 15c. per ton will be paid you upon the consummation of the sale to Owens & Co., as per agreement to that effect.

“I make you the following offer for the future: I will give you a commission of 10c. per ton for all ore introduced to a furnace, that is for the *first* sale made to any furnace, and a commission of 5c. per ton for all blue ore sold for the years 1873, 4, 5, 6, 7 that is, for five years from 1st of January, 1873; and I make you the *sole* agent for the sale of the blue ore for Western Pennsylvania.

“I am, very respectfully,

(Signed) “WM. P. CHAMBLIS,

“*Managing Director.*”

The plaintiff admitted that the defendants had paid him the 15c. per ton on the 15,000 tons. He said this was allowed him for the introduction. That he did introduce the ore to Owens & Co. is beyond doubt, and he seemed to have taken a good deal of trouble in the negotiation. The ore, to be made valuable, required to be de-sulphurized,

and this process required the erection of expensive works.

Owens deposed that they expended \$20,000 on the new works, and before doing so made the defendants contract to give them the option of having large quantities at fixed prices.

It seemed that in 1872 the defendants failed to deliver the whole 15,000 tons; and by an agreement dated 10th February, 1873, it was recited that in 1872, 12,800 tons were then delivered of the 15,000, and that by virtue of the option duly exercised, the defendants were bound to deliver 30,000 tons by the 1st October, 1873, and this was exclusive of the 12,800 tons that should have been delivered in 1872, and which were still to be delivered. Certain modifications were then made in the prices. It seemed that only between 13 and 14,000 tons *in all* had been delivered.

Owens stated that his object was to get the 15,000 absolutely purchased as a trial quantity to see how the ore would work, and that they were satisfied with the result.

The plaintiff's claim was for 5c. commission on the 30,000 tons, which the defendants agreed to deliver in 1873, if Owens & Co. chose to exercise their option to demand them.

It was objected for the defendants: 1. That no contract was shewn; that the plaintiff's appointment was *ultra vires*. 2. That agents could only be appointed by by-law. Objections 3, 4, 5, & 6 were in substance, that the plaintiff was only entitled to commission on the 15,000 tons already sold. Subject to all these a verdict was entered for the plaintiff for \$1,500, or 5c. on 30,000 tons, with leave reserved to the defendants to move for a nonsuit on the objections raised by them.

In this term *J. K. Kerr* obtained a rule *nisi* to enter a verdict for defendants or a nonsuit, under the Law Reform Act.

M. C. Cameron, Q. C., and *R. P. Stephens*, shewed cause.

The plaintiff is entitled to recover the 5c. commission for the 30,000 tons ordered by Owens & Co., under their option.

This clearly appears from Chamblis's letter of the 19th February, and the plaintiff swears that such was the arrangement made at the negotiation at Cobourg. There was no necessity for the plaintiff being appointed by by-law, for Chamblis as Managing Director had power to appoint him, and to enter into the contract for the sale of the ore; and so long as it is shewn that Chamblis is Managing Director, that is sufficient. The Act 16 Vic. ch. 253, secs. 10 and 20, clearly shew this. Sec. 17 does not apply here, as it refers only to financial agents: *Walker v. Great Western R. W. Co.*, L. R. 2 Ex. 228.

Armour, Q. C., and *J. K. Kerr*, contra. The only contract on which the plaintiff can rely is, that contained in the letter of the 19th February, and this clearly shews that the plaintiff was to be paid 15c. on the 15,000 tons sold to Owens & Co., and the latter part of the letter refers to any future sales, and clearly does not refer to the option given to Owens & Co. The parol evidence given by the plaintiff as to what took place at Cobourg was inadmissible, as its effect was to vary the written contract. If defendants had supposed that such evidence would have been received, they would have had Chamblis there to rebut it. The plaintiff, moreover, should have proved that he was appointed by by-law. The mere proof that Chamblis was Managing Director, was no evidence of any authority to appoint agents or enter into a contract like the present, namely, for the sale of ore running over five years. At all events, it should be shewn that the powers assumed to be exercised by him were in accordance with the powers given to him, or that the company ratified his acts. Moreover, under sec. 17 there is no power to appoint agents in the United States, but only in Canada or in England: *Hamilton and Port Dover R. W. Co. v. Gore Bank*, 20 Grant 190; *In re English and Scottish Marine Ins. Co.*, *Ex parte McLure*, L. R. 5 Ch. App. 737; *In re International Contract Co.*, L. R. 6 Ch. App. 525; *Cope v. Thames Haven Dock and R. W. Co.*, 3 Ex. 841; *Leake on Contracts*, 258.

HAGARTY, C. J., delivered the judgment of the Court.

Before discussing the extent of Chamblis's power to bind the defendants, we must ascertain what the true bargain was between him and the plaintiff.

The latter says that, in Cobourg, Chamblis told him verbally that as the contract was assuming a different form from what was at first anticipated, he would pay 15c. on the 15,000 tons then talked of by Owens; and 5c. on the balance of the contract whatever might be ordered.

This was about the 1st of February.

But he also says the bargain was made finally, as in the letter of February 19th, 1872.

I think, both as a matter of fact and of law, we must find that that letter is the whole contract on which the plaintiff can rely, and that his claim must stand or fall on its proper construction.

The letter is written after the Cobourg negotiation and before the execution of the contract with Owens & Co., and from its terms I consider it to cover all the agreement as to commission between the parties.

"A commission of 15c. per ton, will be paid you upon the consummation of the sale to Owens & Co. as per agreement to that effect."

The subsequent execution of the agreement with Owens & Co., consummated the sale of the 15,000 tons, and the plaintiff has been paid his commission.

The letter contains no further reference to anything that was past.

I am of opinion that the subsequent part of the letter does not, as the plaintiff contends, refer to any of the options to purchase reserved to Owens & Co.

I think it refers to any future sales the plaintiff might effect for the defendants, "10c. per ton for all ore introduced to a furnace, that is for the *first* sale made to any furnace."

This sentence could not possibly refer to future dealings with Owens & Co.

Then follows: "And a commission of five cents per ton for all blue ore sold for the years 1873, 4, 5, 6, 7, that is, for five years from the 1st January, 1873."

I think this must be read in connection with what precedes it. A higher commission for introducing the defendants' ore to some new furnace ; and after the introduction, the lower rates for sales—that is, sales after the first introduction—for five years ; and they then make him sole agent for the sale of blue ore in Western Pennsylvania.

The plaintiff insists that the five cents, "for all blue ore sold," for the five years, includes commission on any quantity Owens & Co., might elect to demand under the then existing contract.

Can ore so ordered come under the agreement to pay commission on all the plaintiff might sell for the defendants for the five years ?

I cannot so understand the letter. He had introduced Owens & Co., to them, and received a high commission of 15c. on the ore actually sold.

Owens & Co., could order more or less ore from defendants under their contract, without the plaintiff's intervention.

The letter is divided, I think, into two distinct matters of bargain : 1. As to the sale to Owens. 2. As to all other and future sales.

I think the plaintiff would either have to argue that the bargain was, that he should have, (not 5c.) but 15c. on all that Owens & Co. either bought or might thereafter buy under their option as soon as the contract then in contemplation was executed and the option exercised, or nothing at all on that dealing.

He rests his claim for 5c. per ton on the second branch of the letter.

I cannot think that when the defendants say, "*We make you the following offer for the future,*" they can be held as applying it to the existing arrangement with Owens & Co.

We are not called on to decide whether the plaintiff could claim a commission, if during the five years he should effect any fresh sales of ore to Owens & Co., apart from the then arrangement.

It is to be noted that the letter makes him agent for five

years, from the 1st January, 1873. The contract executed shortly after, on 7th March, 1872, in Pittsburg, is for the right to elect to take ore for five years from the 1st February, 1873.

I agree, that on an agreement to pay commission on all goods which an agent may get buyers to contract to purchase, if the buyer, when so introduced, contracts by a named day to signify his option to purchase, and the seller contracts to accept such option; when the option is exercised and the order given, the agent has earned his commission. *Lockwood v. Levick*, 8 C. B. N. S. 607, may be referred to.

If this construction be correct, the plaintiff will fail, and it will not be necessary to determine the other objections to his right to recover.

I think it right, however, to say that my opinion is, that enough was not proved at the trial to bind the defendants.

It was admitted that Chamblis was "Managing Director" for the defendants. No attempt, however, was made to shew any recognition, adoption, or ratification of his acts by the directors.

We were referred to the original Act of Incorporation of "The Marmora Foundry Company," 16 Vic. ch. 253, (passed in 1853), as the only one requiring examination, though subsequent legislation has formed the defendants' company into its present shape.

This Act provides, sec. 6, for the conduct and management of the business of the company by seven directors.

Section 10—"The directors may make by-laws touching the well doing of the company—the appointment, removal, &c., of managers, agents, officers, &c., as they shall deem necessary for carrying on the business of the company; the making and entering into deeds, bills, bonds, contracts, and other documents and engagements, whether under the seal of the company or not, &c.

Section 20—"Every contract, agreement, engagement, or bargain by the company, or by any one or more of the directors on behalf of the company, or by any agent or

agents of the company, and every promissory note made or endorsed, and every bill of exchange drawn, accepted, or endorsed by such director or directors, or by any officer on behalf of the company, or by any such agent or agents"—(see sec. 17)—"*in general accordance with the powers to be devolved to and conferred on them respectively under the said by-laws, and in pursuance of the same or any of them, shall be binding upon the said company; and in no case shall it be necessary to have the seal of the company affixed to any such contract, agreement, engagement, bargain, promissory note, or bill of exchange, or to prove that the same was entered into, made, or done in strict pursuance of the by-law or by-laws of the company, nor shall the party entering into, making, or doing the same as director or agent be thereby subjected, individually, to any liability whatsoever.*"

This is a very peculiar provision. The seal is not required; and one or more directors or agent may make a contract on behalf of the company and not be individually liable thereon. The act is to be done in general accordance with the powers given by the by-laws, but the bargainee need not prove that it was in strict pursuance of the by-laws.

The only meaning I can attach to this is, that when it is sought to make the company liable on a contract made by any director or agent, something more must be shewn than that the person signing occupied the character or position he professed to hold. It should be shewn that his act was in general accordance with the powers or duties conferred on him by the constitution or by the governing body. If in such general accordance, it would be unnecessary to prove a strict pursuance thereof. A reasonable latitude would be permitted in the exercise of the powers.

But if we hold that nothing more is necessary than to prove Mr. Chamblis to be the general manager, (whatever that means in the eyes of the directors,) then we make the company liable for every bargain or contract, no matter how extensive, no matter how far removed from the popu-

lar conception of the duties of an agent carrying on the daily business of a railway and mining company.

We cannot, I think, hold that an appointment of a sole agent for a number of years for the sale of ore, over a great manufacturing region, is clearly within the ordinary business and authority of a general manager. We are entitled to know something more of the meaning of the term and the duties of the office. If the plaintiff were an agent within the meaning of sec. 17, his appointment is directed to be by by-law. I do not, however, think that he falls within its provisions.

I do not feel called on to review the numerous authorities on the general question. The subject was lately before our Court of Chancery, in *Hamilton and Port Dover R. W. Co. v. Gore Bank*, 20 Grant 190.

As perhaps the latest reported authority on the general question as to the liability of corporate bodies, I refer to *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 13.

We think there must be a nonsuit entered.

Rule absolute.

KERR V. THE GRAND TRUNK RAILWAY COMPANY.

R. W. Co.—Liability for loss of luggage—Evidence.

The plaintiff, an intending passenger by the defendants' railway, a quarter of an hour before the train started, entered a passenger car standing at the station at the original starting point, left his valise on a vacant seat, and went out; and on his return shortly afterwards, his valise was gone. It was not shewn that at the time he left the valise any one was in charge of the train, or that there was any other passenger in the car.

Semble, that there was no sufficient delivery of the valise to defendants to render them liable.

APPEAL from the County Court of the County of York.

This was an action brought by the plaintiff against the defendants for not carrying and delivering a valise belonging to the plaintiff, containing wearing apparel, &c., delivered by the plaintiff to the defendants to be carried from Montreal to Lachine, and there delivered to the plaintiff.

The defendants, amongst other pleas, pleaded that the goods were not delivered to them to be carried, &c.

At the trial on the 11th March, 1874, the plaintiff was the only witness called. He said: "I am the plaintiff. On the 15th January, 1871, I was at Montreal, and went to the defendants' railway station there, purchased, and received from their agent a railway ticket from Montreal to Lachine, and paid forty cents, I think, for it. I then went into the passenger car for Lachine, on the Lachine track, and took my seat, and had with me a valise, and placed it on the seat beside me, about fifteen minutes before the train started. I remained some time, and then stepped out on the platform for a minute or two, and was in and out of the car once or twice, my valise being on the seat, and it remained there to within two or three minutes before the train started. I came into the car and discovered my valise was gone. I at once notified the conductor of it; also the baggage-man and servants of the company. A search was instituted, but was fruitless. I inquired of the people in the car, and examined it thoroughly myself, but could not find it. The train was about starting, and there was no time for doing more. I left a description of the valise and an inventory of its contents with the defendants employees, to enable them to recognize them if they saw or could find them. The valise contained the articles mentioned in the memorandum (produced,) to the value of \$85.98," which, in addition to various specified articles mentioned, also mentioned an item, as sundries. "I left with the train and gave my ticket to conductor, who punctured it in the ordinary way. It is customary for the defendants' company to receive and carry passengers in this way. I entered with my valise, which was a small one. It is usual for passengers to place some article on the seat of the car to indicate that the seat is taken for a passenger. No objection is made to this practice. It is ordinarily done by travellers. I had no notice to have the valise checked, or that it was required to be checked. When I mentioned to the conductor that the valise was lost, he made no objection that it had not been checked."

No one appeared for the defendants, and a verdict was entered for the plaintiff for \$85.98, the full amount claimed.

In the following term a rule *nisi* was obtained to set aside the verdict, and for a new trial, on the ground that said verdict was contrary to law and evidence; and on grounds disclosed in affidavits and papers filed, shewing, amongst other things, that the defendants were not present by their counsel, attorneys, or witnesses, and that they had mistaken the notice of trial, and were in consequence unprepared for the trial; and on the merits.

The affidavits filed shewed that the defendants' counsel had mistaken the notice of trial for the Assizes, which commenced on the 18th March, and that the defendants would have been ready then, and also gave the substance of their defence.

The rule was subsequently argued, and judgment was given discharging it.

From this judgment the defendants appealed.

M. C. Cameron, Q. C., for the appeal. Under the facts in the affidavits, the defendants are entitled to a new trial. Also, on the plaintiff's own evidence, it does not appear that the valise was ever delivered to the defendants. It should have been proved to have been placed in charge of the company, by delivering it to some servant, &c.: *Talley v. Great Western R. W. Co.*, L. R. 6 C. P. 44. In *Gamble v. Great Western R. W. Co.*, 24 U. C. R. 407, where the company were held liable for the loss, it was admitted in the special case that the valise was placed in the car with the knowledge and consent of those in charge of the train. It must also be taken into consideration that at the previous trial, where the case was defended, the plaintiff only recovered \$60, while here he has \$85.98.

Akers, contra. The Court should not interfere on the evidence, as it fully substantiates the plaintiff's claim. As to the notice of trial, the mistake of the defendants in taking it for a notice of the Assizes, is no ground for a new trial; and the Court should not interfere on this ground, as it was fully considered in the Court below.

HAGARTY, C. J., delivered the judgment of the Court.

We are most reluctant to interfere with the discretion of the Court below in granting or refusing a new trial, on such ground, for example, as the absence of the defendant, and the consequent absence of any defence being offered.

In any ordinary case where the unopposed evidence adduced by the plaintiff disclosed a clear cause of action, and the suggested defence would merely raise a question for the jury of doubtful result, it would be very hard to support an appeal against a refusal to interfere.

The strong point of the appellants here is, that the right to recover is by no means clear on the plaintiff's own shewing; or that, on the plea by the defendants that the plaintiff had never delivered the goods to the defendants to be carried, a case was made out.

A perusal of the plaintiff's evidence very naturally suggests to us a state of facts coming within the well-known principle, that where the matters proved are equally consistent with the existence or non-existence of any neglect on the defendants' part, the plaintiff must fail.

This point cannot be satisfactorily settled by merely asking whether the plaintiff had, by his neglect, contributed to the loss. The more important question is: was the valise ever delivered to the defendants to be carried. Was it ever in their proper charge as carriers? A quarter of an hour before the starting of a train, in a station at the original starting point, the plaintiff enters a carriage and leaves his valise on a seat. There is no evidence that any one was then in charge of the things in the train; or that any passengers, except the plaintiff, had entered. After leaving it there, he goes out. It is not easy to see in whose actual charge or care it was during his absence.

The point is well put in *Talley v. Great Western R. W. Co.*, L.R. 6 C. P. 44. We can easily understand the difference between the facts of that case and several others cited, including that of *Gamble v. Great Western R. W. Co.*, 24 U. C. R., 407, where a small valise or other article is shewn to have been put beside the traveller in a carriage, with the knowledge,

if not the actual assent of those in charge of the train—and a case like this, where, before the inception of the journey, and before any one is shewn or can be presumed to be in actual charge of the train, an intending passenger places the valise in a vacant seat, and then goes out.

In this view we certainly think that the application for new trial ought to have been granted; and it may be questioned whether it might not reasonably have been without costs, or with costs to abide the event. At all events, the defendants would be sufficiently punished for their neglect to attend and urge these points of objection of defence, by the payment of the costs of the day.

It is impossible for this Court to avoid noting that the verdict here is for nearly a third more than on the previous trial, where the learned Chief Justice of Ontario specially drew the attention of the plaintiff,—an officer of the Court,—to at least one charge for articles not proved to have been in the valise. On the last occasion, when the defendants were unrepresented, the plaintiff claims and obtains a verdict for the same item, not informing the Court or jury of what had previously occurred.

We cannot refrain from expressing our surprise and regret, first, that such a course should have been followed at the trial; and, secondly, that its propriety should have been defended on the argument before us.

We allow the appeal without costs. We direct that the rule in the Court below should be for a new trial on payment by defendants of the costs of the undefended trial only, not interfering with the rule formerly made by this Court, in ordering a new trial with costs to abide the event.

Appeal allowed (a).

(a) The previous trial was before Richards, C. J., at Toronto, at the Fall Assizes for 1874 when the plaintiff had a verdict for \$60, which the Court set aside, it having been simply left to the jury to say whether the goods had been placed in the car; and a new trial was ordered, with costs to abide the event.

EX PARTE LEES AND THE JUDGE OF THE COUNTY COURT
OF THE COUNTY OF CARLETON.

Contempt—Right of Inferior Court to punish for—Power of Superior Courts.

Every Court of record has the power to punish for contempt; but if the Court is one of inferior jurisdiction, the superior Court may intervene and prevent any usurpation of jurisdiction by it.

Where, therefore, a barrister, during the sittings of the County Court of Carleton, used words which might have been, and were, by the learned Judge, considered to have been used to insult the Court, on being told that unless he offered some apology he would be fined, to which he replied that he had nothing to say; and he was then adjudged guilty of contempt and fined. Upon motion for a *certorari* to remove the order. *Held*, that there was no excess of jurisdiction, and that this Court could not interfere.

IN this term *Patterson*, Q. C., obtained a rule *nisi* calling upon Christopher Armstrong, Esquire, Judge of the County Court of the County of Carleton, to shew cause why a writ of *certiorari* should not issue commanding him to return all orders, rules, judgments, entries, rolls, writs, returns, and other proceedings made, issued, entered, or had in the said County Court, or by him the said Judge of the said Court, concerning Robert Lees, in the month of December, 1873.

The rule was granted on an affidavit filed by Mr. Lees stating that the learned Judge, had imposed a fine of \$100, under the circumstances set forth therein; from which it appeared that the difficulty occurred during the sittings of the County Court of the County of Carleton, at which the said Christopher Armstrong was the presiding Judge, and arose out of the refusal of the learned Judge to grant the applicant a summons for further particulars, under the common counts, which the learned Judge had allowed to be added to the record, in an action on a promissory note, entered for trial at the said sittings, and in which action the applicant was retained as counsel for the defendant, the learned Judge considering the further particulars unnecessary on account of the applicant being fully informed of them from his personal knowledge of a former suit between the parties. The affidavit then stated, "that in all that occurred, I considered I was addressing the said

Judge as if in chambers, and not the said Court, and that I had not the least intention of insulting the said Judge, or shewing any contempt of the said Court;" and that his answer to the learned Judge, when asked to apologise, was that, "as I understand your honour has given your decision, I have nothing to say."

Upon the return of this order, there was an affidavit filed by the learned Judge, which, after stating the facts out of which the difficulty between him and Mr. Lees arose, proceeded: "that I then told Mr. Lees that I would not give him the summons, discussed the matter with him, and gave my reasons. He persisted in his application, and addressed me in the most rude and offensive tone for some time: that I repeatedly ordered him to desist and sit down, which he obstinately refused to do, until at last I told him that if he did not desist and sit down I should call in the aid of the sheriff: that Mr. Lees then addressed me in words to the following effect: 'that he thanked me for the consideration shewn to his poor client;' repeating the same words in a manner to convey the impression that I was less favorable to his client than to the opposite party, and this in the presence of the public and the other members of the Bar; Mr. Lees then sat down: that I then reproached Mr. Lees for using such language, and for his disrespectful behaviour, and that I had a mind to commit him for the offence, to which he made not the least reply: that I then proceeded with some other business, supposing that after a time Mr. Lees would see the propriety of making some apology for his conduct: that shortly afterwards I addressed Mr. Lees again, saying that unless he offered the Court some apology for the aforesaid conduct and language used by him, I should impose a fine upon him; to which, without even rising from his chair, he replied that 'he had nothing to say;' whereupon I ordered him to pay a fine of \$100, and to stand committed till paid." There were other statements in the affidavit to which it is unnecessary to refer.

In the same term *S Richards*, Q. C., shewed cause. It is not the mere use of the words, as here: "I thank you for the consideration shewn to my poor client," that constitutes the offence, but the manner in which they were used; and it is shewn that they were used here in a sneering and most rude and offensive manner; and when the Judge demanded an apology, the applicant refused to give any, stating that "he had nothing to say." The cases shew where the words have been and are by the Judge adjudged to have been used to insult, unless the Inferior Court exceeds its jurisdiction by treating conduct as a contempt which could not by any possibility have been contemptuous, the Court will not interfere; and a barrister may be punished for contempt of Court, even for language professedly used in the discharge of the functions of an advocate: *Ex parte Pater*, 5 B. & S. 299; *Re Carus Wilson*, 7 Q. B. 984; *Re Crawford*, 13 Q. B. 628.

Patterson, Q.C., contra The law seems to be correctly stated in *Ex parte Pater*, 5 B. & S. 299. There it is said that where conduct is treated as a contempt which there is no reasonable ground for so treating, the Superior Court may interfere to protect the party upon whom the power to commit or fine for contempt has been improperly exercised. Here there was clearly no reasonable ground to justify the learned Judge in treating the conduct as a contempt; the words themselves clearly do not amount to a contempt, and they were only used after the learned Judge allowed the common counts to be added, and then refused the applicant's very reasonable request to have better particulars delivered, the Judge giving as the reason for his refusal that the applicant must be aware of them on account of some personal knowledge he had of a former suit between the parties. The applicant distinctly swears in his affidavit that he had no intention of insulting the Judge, and what he said in answer to the learned judge was, that as he understood the learned Judge had given his decision, he had nothing to say. The learned Judge should have pointed out or mentioned to the applicant the words

complained of as containing the alleged contempt, and requested him to withdraw those particular words. Also there is nothing on record to shew what the contempt was. All the record says is, that "Robert Lees in open Court did wilfully insult Christopher Armstrong, the judge of the said Court; and it was then ordered that the said Robert Lees should pay a fine of \$100, for such offence": *Groenvelt v. Burwell*, 1 Salk. 363; *Scott v. Bye*, 2 Bing. 344; *In re Pollard*, L. R. 2, P. C. 106. Consol. Stat. U. C. ch. 15, sec. 23, would also seem to shew that the power of the County Court is limited to the cases therein mentioned.

GALT, J., delivered the judgment of the Court.

The case of *Ex parte Pater*, 5 B. & S. 299, was an application to the Court of Queen's Bench for a rule calling upon the justices of the peace for the County of Middlesex, to shew cause why a writ of *certiorari* should not issue, directed to them, to remove into the Court of Queen's Bench all orders made by them, &c., concerning *Thomas Kennedy Pater*.

The head note to that case is as follows: "Every Court of Record has attached to its jurisdiction, as inherent in it, the power to punish for contempt; but if the Court is one of inferior jurisdiction, the Court of Queen's Bench has authority to intervene and prevent any usurpation of jurisdiction by it; and if it treats conduct as a contempt which there is no reasonable ground for so treating, may interfere to protect the party upon whom the power to commit or fine for contempt has been improperly exercised. A barrister may be punished for contempt of Court, even for language professedly used in the discharge of his functions as an advocate. The Court of Queen's Bench has, however, no jurisdiction to act as a Court of Appeal in such cases. Therefore, where on a trial for felony at the Middlesex Quarter Sessions, the counsel for the prisoner, whose mode of conducting the case had been remarked upon by the foreman of the jury, in his address to the jury uttered words which reflected upon the foreman, and being required by the Judge to withdraw them

refused, and was was therefore adjudged guilty of contempt and fined; upon motion for a *certiorari* to remove the order: Held, that as the words used might have been and were by the Judge adjudged to have been used to insult the juror, there was no excess of jurisdiction, and the Court of Queen's Bench could not interfere."

The law, as laid down in that case is decisive of the present, unless we are prepared to hold that the language used and the manner in which the words were spoken could not by any fair interpretation be construed into an intention to insult the learned Judge.

As was said by the Chief Justice, in *Ex parte Pater*, at page 310, we can say here, "I agree that in themselves they are words which counsel might have uttered in the honest discharge of his duty. * * But if they were uttered with the intention to insult the juryman, then they were an abuse of the privilege of counsel, and the Judge might treat the uttering of them as a contempt and punish it accordingly. We have now before us Mr. *Pater's* denial upon oath that he used these words as a contempt of Court; and I give entire credit to what he says in his affidavit; but unfortunately, when he found that the Judge put an unfavorable construction on his language, instead of explaining himself he persisted in the words, and I think he must be taken to have persisted in them in the sense which Mr. *Payne* had put upon them."

In the case before us Mr. Lees in his affidavit states: "That in all that occurred, I considered I was addressing the said Judge as if in Chambers, and not the said Court, and that I had not the least intention of insulting the said Judge, or shewing any contempt of the said Court."

I am quite sure that had Mr. Lees made a similar statement to the learned Judge at the time, his explanation would have been frankly accepted, but unfortunately he not only did not do so, but when he was told by the learned Judge that unless he offered the Court some apology he would fine him, his answer was, he had nothing to say. Mr. Lees explains this by stating that his answer was; "As I understand

your honor has given your decision I have nothing to say.”

It is very much to be regretted that this difficulty has arisen, when it appears to us that it might have been so readily explained at the time; but as that explanation was withheld, very possibly through a misunderstanding on the part of the learned counsel, it is impossible to say that the learned Judge had no cause for thinking that what took place was designedly done, and that the intention was to treat him with marked disrespect.

We are therefore of opinion that this rule should be discharged.

Rule discharged.

JOHNS ET AL. V. BECK.

Breach of agreement—Nominal damages—Sale of mineral rights in road allowance—Municipal Act, Secs. 441, 442—Construction of.

The plaintiffs and defendant entered into a joint adventure to form a company to work a mine in land forming part of a township road allowance, the defendant to form the company, and the plaintiffs to vest in the company the title to the mineral rights in the land. The plaintiffs accordingly procured a by-law to be passed by the municipality for the sale of the mineral rights, under sec. 442 of the Municipal Act, which authorizes such sale, but with the proviso that the public travel should not be interfered with. A conveyance containing the above proviso was, with the defendant's consent, made to one R. B. J., who executed a formal declaration of trust of one-third interest to the plaintiffs, but not of the balance; but he stated that he held the whole land in trust for plaintiffs, and was willing to convey as they directed, and the plaintiffs informed defendant that they were ready to convey to him. The defendant obtained an Act incorporating a company to work the mine and issue stock, which company proved a failure, but through no default of defendant, who was the heaviest loser of all the parties interested. The plaintiffs having sued the defendant for not forming the joint stock company, or carrying on mining operations, and having obtained a verdict for \$400: *Held*,

Held, also, that the conveyance by the municipality of the mineral rights, under sec. 442, was sufficient, and that sec. 441 for stopping of a road allowance did not apply.

Held, also, that although the conveyance of the mineral rights was to R. B. J., the defendant could not urge that he could not be compelled to convey, owing to the absence of any writing, and that the plaintiffs having control of the title, were in a position to aver and affirm their readiness to perform the agreement.

THE declaration set out an agreement, under seal, between the plaintiffs and the defendant, whereby—in consideration

that the plaintiffs would permit the defendant to enter on a piece of land in the township of Marmora, lying between lot 8 in the 8th concession, and lot 8 in the 9th concession of said township, being 60 rods in length, by 66 feet in width, for the purpose of digging, mining, and sinking one or more shafts thereon, and obtaining any minerals that were thereunder; and in consideration that the said defendant should, for the purpose of working permanently such mines, form a Joint Stock Company, the capital to consist of not less than \$100,000, of which one-fourth should be allotted to and belong to the plaintiffs, paid up in full—the defendant thereby agreed to form such company within ninety days from the date of said agreement, &c., and the plaintiffs agreed to vest in such company a good and sufficient title to the mineral rights of the said piece of land. And that by a supplemental agreement, also under seal, the time for completing the said agreement should be extended to sixty days, after perfecting a good and sufficient title, and that the defendant might at his own discretion suspend operations and work then carried on by him until the title of the said plaintiffs was perfected to the mineral rights in the said agreement mentioned. And the plaintiffs averred that they afterwards perfected their title to the said land and mineral rights of and in the same, and acquired the title thereto unincumbered, and were always ready and willing to convey the said lands and the mineral rights to such company; and all conditions were performed, &c., yet the defendant has not, for the purpose of working permanently the mine in the said agreement mentioned, formed the said Joint Stock Company, or any Joint Stock Company whatever, &c. And for a further breach the plaintiffs averred that after perfecting the said title as aforesaid, the defendant did not, at any time before the commencement of this suit, carry on mining operations on the piece of land in the agreement mentioned, &c.

Pleas. 1. *Non est factum.*

2. That the alleged agreement was made subject to certain terms or conditions then agreed to by and between

the plaintiffs and defendant, and contained therein, that is to say, upon the condition that sixty days, after the plaintiffs perfecting a good and sufficient title to the premises mentioned, should be allowed to the defendant to complete and perform the said agreement on his part, yet the plaintiffs did not perfect such good and sufficient title sixty days before the commencement of this suit.

3. That the alleged agreement was made upon the condition that the plaintiffs should complete, perfect, deduce, and make a good and sufficient title in fee simple to the said premises, to enable the defendant to perform the said agreement on his part, yet the plaintiffs did not complete, &c., a good and sufficient title to enable the defendant to perform the said agreement; and so the defendant was prevented from performing the said agreement on his part by the said neglect and default of the plaintiffs.

4. That the defendant was ready and willing to perform the alleged agreement on his part, but the plaintiffs were not ready and willing to convey the said premises, according to the terms of the said agreement, &c. Issue.

The cause was tried before D. J. Hughes, Esquire, Judge of the County Court of the County of Elgin, sitting for Wilson, J., and a jury, at Belleville, at the Fall Assizes of 1874.

At the trial Walker, one of the plaintiffs, stated that he saw all the parties sign the agreement, and that after the making of that agreement the defendant went on to work the mine, until the supplementary agreement, (12th December, 1872—the original agreement was made on the 21st October, 1872); that when the agreement was entered into the defendant knew that the plaintiffs had not obtained a perfect title, as it was part of a mountain road; that under the Municipal Act they obtained the title from the municipal corporation of Marmora and Lake, and that before the deed was signed a draft of it was submitted to the defendant's solicitor. This was after the supplementary agreement. Mr. Richard Berry Johns was to become the nominal purchaser of this property, and the deed, produced, was made to Richard Berry Johns, at the defendant's request, and

he made a deed to witness, and was ready to convey to any one he wanted. (This was apparently a mistake; the instrument produced was a declaration of trust as regards one undivided third part). That he gave the defendant notice on 17th April, that the title had been procured, and wrote to him to say the title was all ready; that he afterwards met the defendant and gave him notice that they were ready to go on. It appeared that the defendant had got a company incorporated, by special Act, to work mines and to issue stock for that purpose, (36 Vic., ch. 106).

But it was not proved that the company had worked the mine, or in fact that any company had been formed by the defendant in which any capital had been raised.

It is unnecessary to recapitulate any more of the evidence.

The deeds, as far as material, are set out in the judgment.

At the conclusion of the plaintiffs' case several objections were taken to their recovery, and leave was reserved by the learned Judge to move to enter a nonsuit.

No witnesses were called by the defendant, and the learned Judge entered a verdict for the plaintiffs for \$400, reserving leave to the defendants to move to reduce the same to nominal damages, or for a nonsuit.

In Michaelmas Term, *Rusk Harris* obtained a rule *nisi* to set aside the verdict for the plaintiffs, and to enter a nonsuit, pursuant to the leave reserved, or for a new trial on the following grounds:

1. That it was not proved at the trial that a good and sufficient title to the premises was perfected, produced, or made by the plaintiffs sixty days before the commencement of this action, or at any other time, or that the defendant ever had notice thereof, &c.
2. That the plaintiffs were never in a position or ready and willing to make a good and sufficient title to the said premises to the defendant, to enable him to perform the agreement in the pleadings mentioned on his part, or to convey to him, or his appointee, or to any company, or to any other person or persons, the

the said premises according to the said agreement, and within the true intent and meaning thereof; or to reduce the damages to nominal damages, pursuant to the leave reserved on the ground that no proof was given of any actual substantial damages.

In this term, *F. Osler* shewed cause. The plaintiffs are clearly entitled to the amount of their verdict, as the defendant has failed in his agreement to form the company and work the mine, and the evidence shews that the plaintiffs were put to great expense in acquiring the rights of the municipality: *Lord Sondes v. Fletcher*, 5 B. & Al. 835. As to the question of title. All that the plaintiffs were required to do was to obtain the mineral rights in the land, and the by-law of the township municipality, and the subsequent conveyance, under sec. 442 of the Municipal Act of 1873, 36 Vic., ch. 48, is sufficient for that purpose. The sec. 441, sub-sec. 2, does not apply, as it refers to the stopping up of an original allowance for road, and not to the sale of minerals.

Patterson, Q. C., contra. What the defendant acquired under the agreement was the right to sink shafts, and this in reality amounted to a stopping up of the road, and therefore sec. 441, sub-sec. 2, applies, and the township by-law should have been framed in accordance with sec. 424, and confirmed by a by-law of the county council. As to the question of damages, the evidence shews that the whole transaction was a mining speculation in which the plaintiffs and the defendant were jointly interested, and which failed, but through no fault of the defendant, who was the heaviest loser of all the parties, and it would be rather hard to now saddle him with this claim of the plaintiffs. Moreover, there was no actual damage proved by the plaintiffs, and the verdict should be reduced to nominal damages.

GALT, J., delivered the judgment of the Court.

It appears from the evidence that in October, 1872, an agreement was entered into between the plaintiffs and

the defendant, that in consideration that the plaintiffs would permit the defendant to enter on a piece of land forming part of a road allowance in the township of Marmora, (to which, at the date of the agreement, the plaintiffs had no title), for mining purposes; and in consideration that the defendant would form a Joint Stock Company with a capital of \$100,000, of which one-fourth was to be allotted to the plaintiffs, the defendant agreed to form such company, within ninety days from the date of such agreement, and the plaintiffs agreed to vest in such company a good and sufficient title to the mineral rights of the said piece of land: that after such agreement was entered into, and before any company had been formed or any deed obtained from the corporation of Marmora, the defendant entered on the said land and sunk a shaft on it: that in December following a second or supplementary agreement was signed, whereby, among other things, it was agreed "that the said Beck may at his own discretion suspend operations and work at present carried on by him until the title of the said Johns and Walker is perfected to the mineral rights in the said agreement mentioned;" and that immediately after this supplementary agreement was signed the defendant ceased to carry on his works, and has not since renewed them. Up to this time the plaintiffs had no title whatever to the land, but on the 15th March, 1873, a by-law was passed by the corporation of Marmora and Lake, authorizing the sale of the mineral rights to the premises now in question, being a portion of the allowance for road between the 8th and 9th concessions of the township of Marmora. This by-law was passed under the provisions of the Municipal Institutions Act of 1873, 36 Vic., ch. 48, sec. 442, which authorizes the corporation of any township or county wherein minerals are found, to "sell, by public auction or otherwise, the right to take minerals found upon or under any roads over which said township or county may have jurisdiction, if considered expedient so to do. * * Provided also, that the deed of conveyance to the purchaser or purchasers, under

said by-law, shall contain a proviso protecting the road for public travel, and preventing any uses of the granted rights interfering with public travel."

After this by-law was passed the corporation sold to one Richard Berry Johns, who is not one of the plaintiffs, the mineral rights in the land in question.

The deed, which was made on 5th April, 1873, after reciting the by-law, and that the said Richard Berry Johns had purchased the mineral rights, proceeds as follows: "Now this indenture witnesseth that in pursuance of such by-law, and in consideration of the sum of eighty-six dollars," &c., "the corporation of the United Counties of Marmora and Lake doth grant," &c., "unto the said party of the second part, his heirs and assigns for ever, all and every minerals whatsoever, and the veins, lodes, ore, and beds thereof lying within, under, or throughout all that piece or parcel of land (describing it), comprising the said road allowance," &c., "with full right, liberty, power, and authority to the said party of the second part, his heirs and assigns, into or upon the said piece or parcel of land to enter on, and the same to have, hold, possess, and enjoy, and there to break the surface, to dig, search, explore, and excavate the soil and ground thereof, and obtain the said minerals and ores by means of underground workings, with right to follow the veins or lodes with their dips, angles, and variations to any depth, and such minerals, or the ores thereof when found, to dig, take, remove, and carry away; together with the right to the use and enjoyment of the surface of the above described piece of land, subject to the reservation hereafter mentioned. To have," &c., "except and reserving for ever hereafter the surface of the said piece or parcel of land as a road for public travel, and preventing any uses hereby granted from interfering with public travel."

After this deed had been granted, the grantee, Richard Berry Johns, executed a declaration of trust on 11th April, 1873, whereby he declared that he held one undivided third part of the mineral rights granted by the said deed

in trust for the plaintiff Walker. He does not appear to have executed any declaration or deed affecting the other two-thirds, and in fact the legal estate in the whole is now vested in him. He was examined as a witness and stated: "I am the person for whom the deed was made, I hold it in trust for these plaintiffs, and am willing to convey the land as they direct. No deed was ever presented to me, for me to sign. I executed the declaration of trust for Mr. Walker, and am willing to convey the land to any one they direct."

The conveyance from the township municipality does not seem open to the objections taken, as the transaction was under sec. 442, for the sale of minerals, and not under sec. 441, for the stopping up and sale of any original allowance, which requires other formalities.

In the sale of mineral rights the road is not closed, but the rights of the public to use it are reserved, both in the statute and in the deed.

Then as to the pleas respecting the title.

On this record we must assume that the defendant never did form a company,—whatever those vague words may mean,—so we need not discuss whether the agreement "to form a company" was or was not fulfilled, by obtaining the charter in which the whole machinery was fully provided, and provisional directors named. No doubt the parties probably meant by forming a company, the getting the stock taken up.

It seems very clear on the evidence that it was not any difficulty in perfecting the title that prevented the forming of the company, as the parties seem to understand the contract. The defendant consented to the conveyance being made to plaintiff's son. The latter comes into Court and declares he is quite ready to convey.

I do not think it lies with the defendant to urge that he cannot be compelled to convey from the absence of writing.

If defendant shewed that he refused to convey for any such or other reason, it would be very different. If the plaintiffs have got the command and control of the title

and shew their readiness and ability to convey, I think, on a contract worded as this is, they are in a position to aver and prove readiness and willingness to perform their part.

As to damages, we cannot see how it is a case for any thing but nominal damages. The defendant and the plaintiffs were engaged in a joint adventure, from which they expected to reap large profit. The adventure failed utterly, but not from any wilful default or neglect of the defendant. The shares, or the privilege of subscribing for shares, was shewn to be valueless. It was simply a failure, as we understand it, from the want of appreciation on behalf of the public of the benefits promised to all who would subscribe for and take stock.

The defendant, perhaps, was by far the heaviest loser in actual expenditure of all the parties, in his work on the ground.

The rule will be absolute to reduce the verdict to 1s. damages. Certificate for costs stands.

Rule absolute.

Regula Generalis.

The following Rule was read in Court on Saturday, 23rd May, 1874 :—

“ IN THE COURTS OF QUEEN’S BENCH AND COMMON PLEAS.

GENERAL RULE.

Easter Term, 37 Vic., A.D., 1874.

It is ordered that General Rule No. 2 of Trinity Term, 24 Victoria, be rescinded, and that the following be substituted therefor :—

The offices of the Clerks of the Crown and Pleas shall be kept open as follows, that is to say, during Term from ten in the morning till four in the afternoon, and (except between the 1st day of July and 21st day of August) at other times from ten in the morning until three in the afternoon : Sundays, Christmas day, New Year’s day, Good Friday, Easter Monday, the Birthday of the Sovereign, and any day appointed by general proclamation, either by the Government of the Dominion of Canada, or by the Government of Ontario, for a general holiday or for a general fast or thanksgiving, excepted ; and between the first day of July and twenty-first day of August, both days inclusive, when the said offices shall be open from half-past nine in the forenoon until twelve o’clock noon, excepting such days on which the offices may be closed as hereinbefore provided.”

23rd May, 1874.

(Signed) WILLIAM B. RICHARDS, C. J.
JOHN H. HAGARTY, C. J. C. P.
JOSEPH C. MORRISON, J.
ADAM WILSON, J.
JOHN W. GWYNNE, J.
THOMAS GALT, J.

MEMORANDA.

During this term the following gentlemen were called to the Bar :—

JOSEPH EGBERT TERHUNE, PETER MCGILL BARKER,
CHARLES EGERTON RYERSON, ALFRED SERVOS BALL,
CHARLES EDGAR BARBER, FRANK D. MOORE, HAMMILL
MADDEN DEROCHE, CLARENCE WIDMER BALL, E. GEORGE
PATTERSON, GEORGE LEVACK B. FRASER.

TRINITY TERM, 38 VICTORIA, 1874.

August 24th to September 5th.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J

“ “ THOMAS GALT, J.

GREENLAW V. FRASER.

Patentee of the crown—Right to maintain trespass without entry.

The patentee of the crown of land may maintain trespass without entry against a person in actual possession before and at the time of the issuing of the patent, for the letters patent operate by way of feoffment with livery of seizin to the patentee, and defendant's possession must be regarded as an entry subsequent thereto.

Trespass, *quare clausum fregit*. Plea, not guilty.

The cause was tried before Galt, J., at Barrie, at the Spring Assizes of 1874.

From the evidence it appeared that in the year 1864, the plaintiff's father located and entered upon lot No. 23, in the 4th concession of Medonte, the title then being in the Crown. In 1865 the defendant located and entered upon the adjoining lot No. 24, the title thereto then being also the Crown. In 1873 the plaintiff's father transferred to the plaintiff his interest in lot 23, and thereupon the plaintiff obtained letters patent to be issued, granting the lot to him in fee. The plaintiff having had a survey made some time previously of the line between lots 23 and 24, ascertained that, as he contended, the defendant had enclosed part of lot 23 as part of lot 24; and upon obtaining the letters patent for lot 23, he commenced this action against the defendant, without having first made any entry.

It also appeared that the plaintiff was entitled to a part of the land claimed, which was claimed generally as part of lot 23, not described by metes and bounds; but that he sought to recover more than eventually he established at the trial to be part of lot 23.

It was objected, upon the part of the defendant, that the plaintiff, although patentee of the Crown, could not, without entry, maintain this action against the defendant, who was in actual possession of the piece proved to be part of lot 23 at the time of, and before, the issuing of the letters patent. It was also objected by defendant that the verdict should be apportioned, as the plaintiff had failed as to a part of what he claimed.

A verdict was rendered for the plaintiff, with leave reserved to the defendant to move to enter a verdict upon the above objections.

In Easter term, *McCarthy*, Q. C., obtained a rule *nisi* upon the leave reserved.

In this term, *H. H. Strathy* shewed cause. It is objected by the defendant that the plaintiff could not maintain the action, not having first made an entry. The case, however of a patentee is quite different from that of an ordinary vendee, as the issue of the letters patent operates as a feoffment with livery of seisin, and amounts to an entry by the patentee at the date of the letters patent; and defendant's possession is only looked upon as subsequent to the patent: *Clench v. Hendricks*, Taylor, R. 555; *Weaver v. Burgess*, 22 C. P. 104. As to the other objection, if the defendant had limited his defence as to the part to which the plaintiff failed, the plaintiff would have been satisfied; but as he did not do so, the plaintiff is entitled to the whole costs. The plaintiff, however, is willing, if any additional expense has been so incurred, to have it disallowed him.

McCarthy, Q. C. It is not denied by the plaintiff, that to enable an ordinary vendee to maintain trespass there must be an entry, as trespass is founded on actual posses-

sion; and it makes no difference that the plaintiff is patentee: *Street v. Crooks*, 6 C. P. 124; *Ryan v. Clark*, 14 Q. B. 65; *Harrison v. Blackburn*, 17 C. B. N. S. 678. As to the verdict being distributed, the defendant accepts the plaintiff's offer.

GWYNNE, J., delivered the judgment of the Court.

There is no parallel between a person, claiming under a deed of bargain and sale, bringing an action of trespass without entry, when at the time of the execution of the deed a trespasser is in possession, and a person claiming under letters patent direct from the Crown bringing such an action.

In the former case, the trespasser's entry upon the vendor constituting the commencement of a title, which might mature to perfection, to the total exclusion of the vendor's title, and of the vendee as claiming under him, all that passes by the bargain and sale is a right of entry: *Clench v. Hendricks*, Taylor, 555; *Weaver v. Burgess*, 22 C. P. 104. But it has been decided that letters patent from the Crown, being a title by record, operate by way of feoffment with livery of seisin to the patentee. It follows, of consequence, that although an intruder upon the Crown be in fact in possession, he has obtained thereby no incipient title as against the Crown, and so cannot be heard to assert that possession as against the patentee, except as originating subsequently to the letters patent. The possession, as originating an incipient title, can only date from a time *subsequent* to the issue of the letters patent, which, operating as a feoffment with livery of seisin, constitute an entry in fact by the patentee at their date; and the possession which a defendant has at the time of action brought can only be set up from the time it commenced as an incipient title,—that is to say, it must be regarded as an entry upon the patentee subsequent to the feoffment with livery of seisin which the letters patent operate as: *Doe Fitzgerald v. Finn*, 1 U. C. R. 70; *Bacon's Ab.*, vol. vi. p. 465, Prerogative, E. 6.

We were asked, also, to apportion the verdict, the plaintiff having failed as to a part of what he claimed. The defendant however did not, as he might have done, limit his defence to the part as to which the plaintiff failed. If there be any costs, however, attributable solely to the piece as to which the plaintiff failed, the learned Judge who tried the cause, if applied to, will give directions which will enable the Master to disallow to the plaintiff any such costs, as we think he should not have them.

Rule discharged.

McCREADY ET AL. V. HIGGINS.

Married woman—Liability of—35 Vic. ch. 16, O.

Under 35 Vic. ch. 16, O., a married woman is liable only upon contracts entered into on the credit of her *separate estate*.

The real estate of a woman married before 1859, not settled by any marriage settlement or deed, is not her separate estate; and sec. 1 of 35 Vic., ch. 16, which applies only to marriages after that Act, does not make it so.

Where the plaintiffs furnished goods for such a married woman, having such real estate, upon the strength of her having it, and took her bond, without the consent or concurrence of her husband: *Held*, that she was not liable upon it, under 35 Vic., ch. 16, during her husband's lifetime.

THIS was an action against a married woman upon her bond, wherein she described herself as the wife of James Higgins, of the town of Chatham, which bond was in a penalty of \$500, conditioned to pay the plaintiffs for goods to be furnished by them to the defendant's son, to an amount not exceeding \$500. The declaration then set out the goods furnished, &c.

The defendant pleaded that at the time of the execution of the bond she was, and still is, the wife of James Higgins, and that the bond was executed by her without the consent and against the wishes of her said husband.

The case was tried before Morrison, J., without a jury, at Chatham, at the Fall Assizes of 1874.

It was admitted that the defendant was a married woman residing with her husband : that she was married to him before the year 1858, without a marriage settlement : that she was, at the time of the execution of the bond, possessed of real estate, (but not in any way settled to her separate use, unless it was so in virtue of the Acts of Parliament in force relating to the property of married women) : that she executed the bond to obtain the goods for her son to set him up in business : that the plaintiffs accepted the bond and furnished the goods upon the strength of the defendant having such real estate as she had : that the bond was executed without the consent of defendant's husband, the plaintiffs knowing at the time that she was a married woman ; and that goods had been furnished to the defendant's son upon the security of the bond to the amount of \$500.

Upon these admissions a verdict was entered for the plaintiffs for \$500, subject to the opinion of the Court, whether, upon the facts as above stated, the plaintiffs should not be nonsuited, or a verdict entered for the defendant.

In Easter Term *Robinson*, Q. C., obtained a rule *nisi* to enter a nonsuit or a verdict for defendant, pursuant to the leave reserved.

In this term *H. McMahon* shewed cause. The evidence shews that the defendant, a married woman, executed the bond in question to enable her son to obtain the goods, which would not have been delivered without the bond. The case of *Merrick v. Sherwood*, 22 C. P. 467, where all the authorities are collected, shews that where a married woman makes a contract in reference to her separate estate or even where at the time the contract is made nothing is said about the separate estate, if she in fact have separate estate, she is liable to the extent of such estate ; and this has been followed in *Steels v. Hulman*, 33 U. C. R. 471. See also *Walkem's Married Woman's Property Acts*, pp. 54-5 ; *Griffith's Married Woman's Property Act*, p. 5. The plaintiffs are, therefore, entitled to recover in this case.

Robinson, Q. C., contra. The case does not come within *Merrick v. Sherwood*, 22 C. P. 467, for that case only decides that a married woman possessed of separate estate within the meaning of 35 Vic. ch. 16, is liable to the extent of that estate. Here, however, the estate is not separate estate, but such an estate only as came within Consol. Stat. U. C. 73, and therefore, as held in *Balsam v. Robinson*, 19 C. P. 263, and subsequently in *McGuire v. McGuire*, 23 C. P. 123, it is not liable to her separate contracts.

GWYNNE, J., delivered the judgment of the Court.

On the argument before us it was admitted that the defendant had no separate estate, unless real estate of a married woman married before 1859, not settled by any marriage settlement or any deed, is, by force of the statutes relating to married women, her separate estate.

Consistently with this state of facts and with previous decisions, the only judgment which, as it seems to us, can be given is, that the rule must be made absolute to enter a nonsuit.

In *Kræmer v. Gless*, 10 C. P. 473, it was decided that the Consol. Stat. U. C. 73, did not alter the power of a married woman to make contracts, and that she was not enabled to bind herself while a *feme covert* more than she could before it was passed.

In *Mitchell v. Weir*, 19 Grant 568, Strong, V. C., held that a married woman's interest in real property under the Act, ch. 73, is altogether the creature of the statute, and that her title under the Act was quite different from that which she has in equity to property settled to her separate use.

In *McGuire v. McGuire*, 23 C. P. 123, I and my brother Galt, in the absence of the Chief Justice, after a review of all the authorities, came to the conclusion that all that the first and second sections of Consol. Stat U. C. ch. 73, confer upon a married woman is a *jus protegendi* her real property, free from the common law control, power, and disposition of the husband, and not a *jus disponendi* against the will of her husband.

In *Dingman v. Austin*, 33 U. C. R. 193, the Court of Queen's Bench has decided that the first section of the Married Woman's Act of 1872, 35 Vic. ch. 16, applies only to the cases of marriages which take place after the passing of the Act.

When the case of *Merrick v. Sherwood*, 22 C. P. 467, was before us, I confess I entertained the opinion, although the question was not then before us for adjudication and in no way affected my judgment upon the point which was before us, that the very general language of the Legislature seemed to indicate an intention that this section should apply to all marriages, whether had before or after the Act. Still I must admit that the decision of the Court of Queen's Bench is more in accordance with the general spirit of legislation, and with my own opinion of what the law ought to be. It is an express decision upon the point, which we should follow until reversed upon appeal, even though we differed with it, and for myself I am glad that the Court considered that the language of the Act was open to the construction which they have put upon it.

The result is, that the property held by a married woman, of the nature of that admitted to be held by the defendant in this case, is in the same position as it was before the passing of 35 Vic. ch. 16; for there is no other Act declaring it to be her separate property: in other words, the defendant holds it now, as always, under the provisions of the Consol. Stat. U. C. ch. 73.

Now in *Merrick v. Sherwood*, 22 C. P. 467, what we decided was, that the ninth section of 35 Vic., ch. 16, only affected the remedies which upon the passing of the Act existed, both in favor of and against a married woman; and we held that the action in that case lay upon the express ground, which was concluded by the finding of the jury, that the goods were sold to the married woman upon the understanding that they should be paid for by herself out of certain separate estate which, in that case, it was admitted that she had, and upon the faith and credit of that estate.

The remedies given to her are expressly stated to be for the recovery, protection and security of property by that or any other Act declared to be her separate property; and the remedy given against her is, that she may be sued separately from her husband for her *separate* debts, *engagements*, *contracts*, and torts.

As to the first point—namely, the remedies given to her—we held in *McGuire v. McGuire*, 23 C. P. 123, that the action did not lie, upon the ground that the property in respect of which that action was brought was not by any Act declared to be her separate property, but was vested in her and her husband, the defendant in that action, under the provisions of the first section of Consol. Stat. U. C. ch. 73; and as to the remedies given *against* her, we decided that the separate debts, engagements, and contracts referred to in the ninth section of 35 Vic. ch. 16, were those debts, engagements, and contracts which, in view of their having been entered into upon the faith and credit of *separate* estate, the Courts of Equity attached upon and satisfied out of such separate estate; and we held that the operation of the ninth section of 35 Vic. ch. 16, so far as concerned remedies against the separate contracts, debts, and engagements of the wife, was simply to give a remedy at law to her creditor, in addition to the remedy he already had in equity.

We did not hold that a married woman had incurred a liability at law in any case wherein the liability in equity did not exist at the time of the passing of the Act. We are not warranted in holding that she is entitled to contract so as to bind herself in any manner not specially declared by the Act.

There is a case reported in the *Times* of July 9th, in the Court of Common Pleas, which confirms this view, namely, *Summers v. City Bank* (a).

The question arose upon a demurrer to a replication, and was whether, under the 11th section of the Married

(a) Now reported in L. R. 9 C. P. 580.

Woman's Property Act, 1870, a married woman was entitled to sue a banker for dishonoring a cheque, for not paying a bill of exchange, and for not giving notice of its dishonor. It was admitted on the pleadings that the cheque and bill were connected with her separate trade, and that the bank knew it.

The section provides that a married woman may maintain an action in her own name for the recovery of any wages or earnings, as in our Act is provided, and that she shall have in her own name the same remedies as an unmarried woman against all persons for the protection and security of such wages or earnings.

The Court is reported to have held that, having regard to the peculiar relations of a banker to his customers, the action was maintainable in respect of all the points complained of, *but guarded themselves against being supposed* to decide that a married woman could bring an action for breach of contract, independently of the provisions of the Act.

The conclusion at which we arrive is, that, inasmuch as the property referred to as being held by the defendant is not by any Act declared to be, or by any deed in fact made to be her separate estate, she can no more be proceeded against now than she could before the passing of 35 Vic. ch. 16; and inasmuch as the Court of Chancery could not affect this property for the satisfaction of this bond, at least during the life of the husband, no action can at law be maintained against her under the 35 Vic. ch. 16.

The rule therefore will be absolute to enter a nonsuit.

Rule absolute.

LAPP V. FIRSTBROOK ET AL.

*Action for work and labour—Fraudulent representations—Equitable plea—
Claim for unliquidated damages.*

Action on the common counts for work and labour in cutting and sawing timber for defendants. Plea, on equitable grounds, in substance, that the plaintiff falsely and fraudulently represented to the defendants that he had certain interests in and the title to certain lands, and certain interests in and the right to cut timber on other lands, whereby defendants were induced to purchase the said interests, &c., paying a certain sum down, and securing the rest by mortgage; and it was further agreed that the plaintiff should cut and saw into lumber all the saw logs on said lands first mentioned for the defendants: that defendants, relying on plaintiff's representations, entered upon said lands and cut and made timber on said lands secondly above mentioned, and expended a large sum of money therein; yet that the plaintiff had not the right in respect of a large quantity of the said secondly above mentioned lands, by reason whereof defendants acquired rights of much less value than the plaintiff represented he possessed, namely, by a sum exceeding the plaintiffs' claim; and defendants first became aware of the said false and fraudulent representation after they had purchased said lands, cut the timber, and expended the moneys as aforesaid, and defendants are likely to lose a large quantity of the said timber and sawlogs so cut and made by them as aforesaid: that the plaintiff's cause of action arose in cutting and sawing into lumber, under said agreement, the sawlogs upon the said first above mentioned lands, and otherwise in part performance of this agreement. And defendants prayed that it might be declared that they were not liable to pay anything to the plaintiff, and that the plaintiff might be ordered to pay defendants what is just and equitable for the loss they have sustained.

Held, plea bad, as constituting no defence, but only amounting to a claim for unliquidated damages, the subject of an action at law and not of a suit in equity.

Held, also, that no ground was shewn for the rescission of the contract, and an amendment, by adding a prayer therefor, was refused.

Quære, as to defendants' right to claim a rescission of the contract.

DECLARATION on the common counts, for goods sold and delivered, work and materials, and board and lodging furnished to defendants and their servants.

Fourth plea, on equitable grounds: that before the plaintiff's alleged cause of action arose, the plaintiff pretending to have certain interests in and title to certain land in the Township of Laxton, and certain interests in and the right to cut the timber at that time being in and upon certain other lands in the said township, falsely and fraudulently represented to the defendants that he, the said plaintiff, was possessed of such interests, &c.; and the defendants being

desirous of purchasing from the plaintiff the said interests, &c., caused an examination of the said lands, and of the said timber, to be made; and thereupon the defendants, as the plaintiff well knew, relying upon the said false and fraudulent representations so made to them as aforesaid, and believing the said false and fraudulent representations to be true, and being induced thereby, as the plaintiff also well knew, so to do, made and entered into an agreement with the plaintiff for the purchase from him, the plaintiff, of the said interests, &c., which he, the plaintiff, falsely and fraudulently represented he was possessed of, as aforesaid, for \$5,000, to be paid by the defendants to the plaintiff therefor: \$500 whereof was to be paid at the time of the making of the said agreement, and the further sum of \$500 in twenty days thereafter, and the balance of \$4,000 to be secured by a mortgage upon the said firstly above mentioned land, to be paid on the days and times then agreed upon, and to be named in the said mortgage. And the defendants, in pursuance of the said agreement, and relying, &c., paid to the plaintiff the \$500 at the time of making said agreement, and the \$500 in the twenty days thereafter, and made and executed to and delivered to the plaintiff the said mortgage, &c. And it was thereupon further agreed that the plaintiff should and would cut and saw into lumber all the said sawlog then being upon the said firstly above mentioned lands for the defendants. And the defendants say that relying, &c., they entered upon the said lands, and cut and made into timber and saw-logs a large amount of the said timber at the time of making of said agreement being in and upon the said secondly above mentioned lands, and thereon and thereabouts expended a large sum of money, in good faith and in pursuance of the said agreement, relying, &c. And the defendants further say that the said false and fraudulent representations so made as aforesaid, and whereby they were induced to make and enter into the said agreement, and to pay to the plaintiff the said two sums of \$500 each, and to make, execute, and deliver to the plaintiff the said

mortgage securing the payment of the said further sum of \$4,000, and to expend a large sum of money as aforesaid, were false and untrue, in that the plaintiff had no such right as he falsely and fraudulently represented and pretended in respect of a large quantity of the said lands—by reason whereof the defendants have, under the said agreement, acquired rights of much less value, to wit, by a sum exceeding the amount of the plaintiff's claim in this action, than the plaintiff falsely and fraudulently as aforesaid represented he was possessed of in respect of the said secondly above mentioned lands, and which the plaintiff falsely and fraudulently, as aforesaid, pretended to sell to the defendants as aforesaid; and the defendants first became aware of the said false and fraudulent representations after they had paid the sums of money as aforesaid, and made, executed, and delivered to the plaintiff the said mortgage, and after having expended a large sum of money as aforesaid; and the defendants are likely to lose the moneys by them expended in and about the manufacture of a large quantity of the said timber and sawlogs, so cut and made by them as aforesaid. And the defendants further say that the plaintiff's alleged cause of action arose and accrued to him for the cutting and sawing into lumber the said sawlogs at the time of the said agreement being upon the said firstly above mentioned land, and otherwise in the part performance of the said agreement. And the defendants pray that it may be declared they are not liable in respect thereof to pay the same to the plaintiff, or any part thereof; and further, that the plaintiff may be ordered to pay to the defendants such sum of money as may be just and equitable in the premises to compensate them for the loss and injury they have sustained by reason of the said false and fraudulent representations as aforesaid.

The plaintiff demurred to this plea, on the grounds:
1. That the said plea attempts to avoid the liability to pay for sawing the logs therein mentioned, merely by shewing how the defendants acquired the logs,

which is no answer. 2. That no equity is shewn affecting the claim in this action, nor any equity whatever.

Beaty, Q. C., for the demurrer. It is quite clear that previous to "The Administration of Justice Act, 1873," the plea would not constitute a defence on equitable grounds, as it does not shew such a state of facts as would entitle the defendant to an absolute, perpetual, and unconditional injunction: *Fitzgerald v. McCullagh*, 7 Ir. C. L. R. 457; *Stimson v. Hall*, 1 H. & N. 831. The question then is, does it, under the "Administration of Justice Act, 1873," shew sufficient to entitle the defendant to some relief in Equity? It clearly does not do so, as it simply sets up a claim for unliquidated damages, which is not the subject of a suit in equity, but of a cross action at law: *Mayne on Damages*, 2d ed., 75; *Henderson v. Brown*, 18 Grant 79.

J. K. Kerr, contra. Apart from "The Administration of Justice Act, 1873," the plea constitutes a good defence, as it shews that the defendant was induced to enter into the contract by fraud, and this would entitle the defendant to an absolute, perpetual, and unconditional injunction in equity. However, under that Act, sec. 3, the defendant need not shew that he is entitled to such an injunction, but it is sufficient if he shew that he is entitled to some substantive relief, namely, to have the contract rescinded. The cases shew that, in such a case, the Court of Equity would rescind the contract: *Best v. Hill*, L. R. 8 C. P. 10; *Kemp v. Pryor*, 7 Ves. 238; L. R. 88, 300; *Ex parte Stephens*, 11 Ves. 24. It is contended by the plaintiff that the plea simply amounts to a claim for unliquidated damages; but the plea asks for two things, namely, relief from the contract on the ground of fraud, and damages for the fraud; and although the claim for damages may be the subject of an action at law, it does not take away the equitable right: *Ramshire v. Bolton*, L. R. 8 Eq. 294; *Kerr on Fraud*, 7, 10, and the cases there referred to.

The claim for damages may, however, be struck out, and there remains a good defence. If the Court are of opinion that there should be a specific prayer for the rescission of the contract, leave is asked to make such amendment.

GWYNNE, J., delivered the judgment of the Court.

The claim asserted by the defendants cannot be set up at law or in equity as a set-off to the plaintiff's claim. The foundation laid by the defendants is, that by reason of the plaintiff falsely representing that he had a good title to sell certain land, whereas in truth, as to part, he had not, he induced the defendants to buy. It is not alleged in the plea that the plaintiff covenanted for title. If he did, the defendants' remedy would be for unliquidated damages at law in an action upon the covenant. If there were no covenant for title, still the defendants' remedy would be at law for unliquidated damages, in an action for deceit. They would have no action in equity at all to recover unliquidated damages, so that there can be no pretence for entertaining the plea as a defence to the present action.

Moreover, assuming it to be true that the defendants had not good title to the whole of the land conveyed, still there is no suggestion in the plea that the defendants have not had the full benefit of all the timber, for the sawing up of which the plea alleges this action is brought. There seems no connection, therefore, between the subject matter of the plaintiff's suit and the subject matter in respect of which the defendants assert an equity; for if the defendants acquired the timber, for sawing which this action is brought, although they did not get a good title to the whole of the land for which they contracted, still they could not set up the matter relied upon in defence of this suit. Even in equity, where cross demands arise out of the same contract, the Court will not make the granting the plaintiff relief conditional upon his doing equity to the defendant in respect of his demand: *Gibson v. Goldsmid*, 5 DeG. Mc.N. & G. 757.

The defendants' counsel on the argument, however, apparently abandoning the plea as bad, asked leave to amend the plea by praying for a total rescission of the contract. But assuming all the allegations contained in the plea to be true, still, (if a right to the rescission of the contract could be set up as a defence to an action like the present), we see nothing in the plea which would justify a rescission of a contract completely executed, by a deed purporting to convey all that the defendants agreed to buy, and by a mortgage executed back by the defendants to the plaintiff to secure the balance of the purchase money.

To rescind such a contract it would be necessary to establish : 1. Not merely a want of title in the vendor to a part of the property purported to be conveyed, but some actual fraud on the part of the vendor. 2. It would be necessary for the plaintiff to explain to the satisfaction of the Court how he came not to discover the defect in the title, whatever it may be, before he accepted the deed and executed the mortgage. 3. The plaintiff would have to establish that he has not been guilty of any delay or negligence since he discovered the alleged fraud upon which he relies as a ground of rescinding the whole contract. 4. And as there can be no rescission of a contract, where a plaintiff, with full knowledge of all the facts, has continued to deal with the property, or has exercised the rights of ownership over what has been well conveyed to him, it would be necessary for the plaintiff to shew precisely when he discovered the fraud of which he complains, and that since his discovery of it he has not exercised or asserted ownership over any part of the property, and that he has not by act or delay waived his right to rescind the contract.

We cannot, from anything before us, authorize an amendment of the plea for the purpose asked; but if the defendants should be advised that they can present such a case upon affidavit as would entitle them to have such a plea pleaded to the present action, they may apply, upon an affidavit, to the Judge presiding in Chambers, in the ordinary way,

for leave to add a plea upon payment of costs; such application to be made within one week from the 18th September.

The rule will go for judgment for the plaintiff on the demurrer, with liberty to the defendants to apply in Chambers to add a plea, on payment of costs.

Judgment for plaintiff (a).

STEVENSON ET AL. V. RICE.

"Rent receipt"—Effect of—Property passing.

The plaintiffs, who were piano manufacturers, offered to sell to M. a piano for \$300, and to accept certain approved notes in payment. The piano was left with M., but this negotiation fell through, and it was then agreed that M. might have the piano on giving his notes at 1, 12, and 24 months for \$100 each. These notes were sent to M., with a "Rent Receipt," both of which were signed by him and returned to the plaintiffs. By the rent receipt, M. was to have the piano on hire at \$6 per month, for three months, payable in advance, and M. might purchase it on payment of the notes, with interest. But until the whole of the purchase money was paid, the piano was to remain the plaintiffs' property on hire by M., the plaintiffs to have power to retake possession without demand, on non-payment of any instalment of purchase money or rent in advance, and although part of the purchase money might have been paid or notes given on account thereof. The agreement for sale being conditional, and punctual payment being essential to it. Nothing was paid on the piano as purchase money or rent, and on the 26th January, 1874, the first note having fallen due on the 18th, it was seized under an attachment against M. as an absconding debtor.

Held, that no property in the piano passed to M., that being the intention of the parties, and the legal effect of the instrument; that the arrangement was not objectionable as being contrary to the Chattel Mortgage Act, and therefore the plaintiffs were entitled to the piano as against M.'s creditors.

THIS was an interpleader issue to test the validity of a seizure of a piano by the Sheriff, on a writ of attachment against one Jerome Monk, an absconding debtor, dated 26th January, 1874, issued at the suit of the defendant.

The cause was tried before S. Richards, Q. C., sitting for Galt, J., and a jury, at Kingston, at the Spring Assizes of 1874.

(a) See *Georgian Bay Lumber Co. v. Thompson*, 35 U. C. R. 64.

The plaintiffs did business under the name of Weber & Co., Piano Manufacturers, in Kingston; and Monk lived in Collingwood.

The plaintiffs' agent proved a negotiation with Monk as to the piano. The selling price of the piano was \$300, and at first some notes held by Monk were shewn to the agent, which the latter after inspection and enquiry decided on accepting, and offered to Monk either to take the notes in payment, or to let him have the piano on a rent receipt, he paying \$100 down. The agent delivered the piano at Monk's, but did not find him at home. He had left town; and the agent left word with Mrs. Monk for him to send down the notes to Kingston. In a week or ten days the agent, having returned to Kingston, found that Monk had not sent down the notes.

On the 3rd December the agent wrote telling him to send the notes; that the piano he had got was a very fine one, the usual price being \$375. "You get it \$75 under price."

On December 7th, Monk wrote enclosing certain notes, not the same, but what he said were equally good, and asking them to send him a receipt for the instrument.

On the 9th December they wrote back objecting to the notes, and adding: "We would like to sell you the piano, but could not for one moment entertain any other proposition than that made you. We sell the same instrument at the factory for \$375."

On the 15th December, Monk wrote saying he was willing to take the piano on the terms they first proposed. "I will give you \$100 cash in January, say 15th; and \$100 with interest on whole amount in one year; and balance in two years. If this suits you, you can make out the mortgage same as before, with above conditions; you can also remit the notes I sent you."

On the 16th December the plaintiffs wrote saying they accepted his offer; that they returned the notes sent, and enclosed notes "to be provided with your signature, for the piano, and also rent receipt, which states that the piano is ours until paid for, which please sign," &c.

On the 22nd December Monk wrote: "Enclosed please find notes with signature." No reference was made to the rent receipt.

The agent swore the rent receipt was enclosed with the notes, and was as follows:

"Received from Weber & Co. a seven octave rosewood piano, No. 6854, on hire for three months at \$6 per month, payable in advance, the said piano being valued at \$300, which sum I agree to pay in the event of the said instrument being destroyed, injured, or not returned to the said Weber & Co. on demand, free of expense, in good order, reasonable wear excepted. It is agreed that I may purchase the said piano for the sum of \$300, payable as follows: Three promissory notes, payable in one, twelve, and twenty-four months from the date hereof. The whole to be paid within the said time with interest at seven per cent. per annum from date. But until the whole of the said purchase money be paid, the said piano shall remain the property of the said Weber & Co., on hire by me. And in default of the punctual payment of any instalment of the said purchase money, or of the said monthly rental in advance, the said Weber & Co. may resume possession of the said piano without any previous demand, although a part of the purchase money may have been paid, or a note, or notes, given by me on account thereof, this agreement for sale being conditional, and punctual payment being essential to it. But, in the event of the said piano being so returned to the said Weber & Co., in good order, any sum received on account of the purchase money beyond the amount due for rent, and any expenses incurred in reference to the said instrument, will be repaid.

"Witness: }
 (Signed) "JEROME MONK."

He also said that when he delivered the piano at Monk's house he left a rent receipt with Mrs. Monk, saying that Monk could send the receipt or the notes.

The notes were left with the bank for collection, but were not discounted.

The first note fell due on the 18th January, 1874, and was dishonoured. Nothing was paid on any of them, nor anything paid as rent.

The attachment was issued on the 26th January; and about 1st February it was sworn the piano was under seizure by the sheriff thereon.

The plaintiffs stated that they took such receipt when they wanted to be secure, and were doubtful about the parties; that they never took chattel mortgages, not wanting to be troubled with such securities.

A nonsuit was moved on many grounds. The objections were in substance that it was a case of mortgage, and contrary to the chattel mortgage Act, and void against creditors; that if not, it was a sale to Monk and a resale to the plaintiffs, without delivery or registered mortgage.

Leave was reserved to move on these objections.

The learned Queen's Counsel told the jury that he thought such an arrangement as was mentioned in the receipt was legal, and that if it truly represented the agreement, the property would remain in the plaintiffs until the notes were paid. It was left to them to say was there an absolute sale to Monk, and was it the intention of both parties that the property should pass to him at once; if so to find for the defendant. But if they thought the receipt disclosed the real understanding, and that the property was not intended to pass, but should remain in the plaintiffs' till the notes were paid, to find for the plaintiffs.

It was objected for the defendant that the jury should have been told they were not bound by the writing; that if from the facts there was really a purchase intended of the piano for \$300, by Monk's notes secured on the piano, they should find for the defendant, and falsely alleging the contrary in the writing would not alter the conclusion; and that such an arrangement, though good between parties, was void against creditors.

The jury found for the plaintiff.

In Easter term *R. Martin* obtained a rule *nisi* on

the leave reserved, or for a new trial for misdirection and non-direction, setting out the objections at length.

In the same term *J. K. Kerr*, shewed cause. The question is, whether there was a sale so as to pass the property to Monk. The evidence shews that there never was a sale, as the plaintiffs refused to accept the notes sent by Monk, but made him sign the rent receipt, and it was under this receipt that he held the piano. This was simply a lease, at a stated rent payable in advance, with an option to purchase, and no doubt if the notes, which Monk sent, had been paid the piano would have become his, but not till then; and it can make no difference that the plaintiffs kept the notes. The question of property passing is one of intention, and there was clearly no intention here that the property should pass, and the jury have so found: *Bank of Upper Canada v. Killaly*, 21 U. C. R. 1; *Robertson v. Strickland*, 28 U. C. R. 221; *Logan v. LeMesurier*, 6 Moore P. C. 116. (a) The very essence of a sale is wanting, namely, the transfer of an immediate right of property.

R. Martin contra. The evidence shews that the piano was sold to Monk, and that he gave his notes for the purchase money, and then he signs the rent receipt, which in reality amounts to a mortgage. The transaction is therefore a sale with a mortgage back for the purchase money, and is void against creditors under the Chattel Mortgage Act for want of registration. At all events it is an attempt to obtain a lien on chattels, as a security, apart from the possession, and therefore void: *Jenkins v. Eichelberger*, 4 Watts 121; *Wilson v. Stox*, 10 Watts 434; *Lingham v. Biggs*, 1 B. & P. 82; *Sheridan v. Macartney*, 5 L. T. N. S. 27; *Darby v. Smith*, 8 T. R. 82; *Ex parte Hopcraft*, 14 W. R. 168; *Ex parte Mackay*, 28 L. T. N. S. 828.

HAGARTY, C. J.—I see no reason for not holding on the evidence that the “rent receipt” was the final and actual arrangement entered into between the parties, and that the

(a) See *Ogg v. Shuter*, L. R. 10 C. P. 159.

jury properly found that this writing did disclose the real understanding of the parties.

The question for us is, what does this writing mean,—what is the contract to be gathered from it?

The plaintiffs were quite willing to sell the piano directly to Monk on receiving certain approved notes of other parties. This proposal fell through, and then they make this contract.

I was a good deal impressed with Mr. *Martin's* argument against the validity of such an arrangement against creditors, as being a fraud on the Chattel Mortgage Act, and an attempt to give a lien on a chattel without actual possession or a registered mortgage.

I have examined the cases cited. They all seem to start with the existence of the right of property in the debtor at some one time.

Here the whole claim rests on the assumption that at no moment did the property ever pass to or vest in Monk, or pass from the plaintiffs.

An agreement for giving a future bill of sale, a covenant for a right to take possession of chattels on a prescribed default or contingency, &c., may be defeated as against creditors, if the Bills of Sale Act be not complied with.

Two questions may be asked here: First, what was the true intention of the parties,—that the property should pass or not? The jury say it was not to pass; and I see no reason to doubt the correctness of the finding. I am quite satisfied the plaintiffs never intended it should pass.

Then, apart from an actual intention, what is the legal effect of this writing?

It certainly professes to be a mere hiring at a specified rent per month. A value is stated, and Monk may purchase for \$300, payable as follows: "Three promissory notes payable in one, twelve, and twenty-four months from the date hereof. The whole to be paid within the said time, with interest at 7 per cent. per annum from date. But until the whole of the said purchase money be paid, the said piano shall remain the property of the said Weber &

Co. on hire by me :” with power to the plaintiffs to retake possession without demand on non-payment of any instalment of the purchase money, or of rent in advance, although part of the purchase money has been paid, or notes given therefor; the agreement for sale being conditional, and punctual payment being essential to it.

I think it impossible to hold that the property passed by force of this instrument.

It may be quite true that on payment of the notes the property must become Monk’s, and that as the agreement is worded, he could have ensured its becoming his property by paying the notes and rent. The question is not embarrassed by any part payment, or possible part interest acquired thereby.

As I understand the evidence, nothing was paid on the piano; and a few days after the dishonour of the first note it was seized, on an attachment, by the Sheriff at a creditor’s suit.

I am unable to see how the plaintiffs have lost their right of property, and think the rule must be discharged.

GWYNNE, J.—I am of opinion that the case turns upon what was the intention of the parties, as was held by the learned Queen’s Counsel who tried the case: and upon the evidence given at the trial I do not think the verdict of the jury can reasonably be found fault with.

GALT, J., concurred.

Rule discharged.

THE QUEEN V. THOMPSON AND SMALLPIECE.

Libel—Criminal information—Affidavits—Sufficiency of.

On an application for a criminal information against defendants for a libel, the applicant's affidavit stated that he had read an article published in the *National* newspaper in Toronto, on the 16th of July, 1874, setting it out: that he was the person referred to: that the statements therein were untrue; and that they were intended to prejudice and injure him: that the defendants were, on the 16th of July, proprietors and publishers of said paper; and that the article was printed and published by them, and is the same article contained in the said newspaper, attached to the affidavit of R., "filed on this application." R.'s affidavit was sworn on the 22nd of August, and stated that "the annexed copy of the *National* newspaper, bearing date the 16th July, 1874, was on that day published in Toronto at No. 21 Adelaide Street East," by defendants, "who are the publishers and proprietors thereof." The newspaper contained the libel set out in the applicant's affidavit. The application was not made until the 24th of August, two days after the affidavit was sworn.

Held, that the applicant's affidavit was sufficient: that the reference to R.'s affidavit as "filed on this application" could only mean, there being only one application, the application about to be made on these affidavits.

Held, also, that it was no objection that the rule *nisi* was stated to have been moved by counsel for the Crown, instead of for the applicant.

Held, also, that it was no objection that the affidavit described the applicant as "Esquire" only, for it was not necessary to shew that he occupied any public or official position.

In answer to the application the defendants filed an affidavit stating that they had no personal knowledge of the matter contained in the alleged libels, but received the information from persons whom they believed to be reliable and trustworthy: that the *Globe* newspaper was controlled by the applicant, who was an active politician, and had published a number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true and without malice.

Held.—No answer.

THIS was an application on behalf of Mr. George Brown for leave to file a criminal information against these defendants as the publishers of certain libels against him.

The applicant's affidavit, sworn on the 22nd of August, 1874, and describing himself as "George Brown, of the City of Toronto, in the County of York, Esquire," stated that he had read an article, published in the *National* newspaper, in Toronto, on the 16th of July, 1874, setting it out verbatim: that deponent was the person referred to: that the statements therein were untrue; and that they

were intended to prejudice and injure him : that the defendants are and were on said 16th of July, 1874, the proprietors and publishers of the said *National* newspaper, and the said article hereinbefore set out and referred to was printed and published by them, and is the same article which is contained in the said newspaper attached to the affidavit of Charles Lysander Roberts filed on this application.

The affidavit of Roberts was sworn on the same day, and stated that "the annexed copy of the *National* newspaper, bearing date on 16th July, 1874, was on that day published in Toronto, at No. 21 Adelaide Street East, by Thomas Phillips Thompson and Henry Edward Smallpiece, who are the publishers and proprietors thereof."

The newspaper annexed contained the libel set out in the applicant's affidavit.

A similar affidavit was filed by the applicant as to each of two other libels, accompanied by a like affidavit, with the newspaper attached.

The application was made to the Court on the 24th of August, and the rule *nisi* was drawn up "on reading the three several affidavits of George Brown, and the several affidavits of Charles L. Roberts, Alfred Howell, and Trevellyan Ridout, and the printed papers thereto annexed, and also a part of a printed paper annexed to the said affidavit of C. L. Roberts, beginning with the words," &c. ; and was stated to be "on the motion of J. H. Cameron, Q.C., of counsel for the Crown."

On shewing cause the defendants filed an affidavit to the effect that they received information of the matters stated in the alleged libel from persons whom they believed to be reliable and trustworthy, and that they had no personal knowledge of the matters : that the *Globe* newspaper, which is controlled by the applicant, published a number of articles violently attacking the private and moral character of one Dr. Sangster, a candidate for a public office, and articles upon that subject were continually appearing in said newspaper : that the applicant is an active politician, and uses the paper he controls to attack the personal and

private character of persons politically opposed to him, and having attacked the said Dr. Sangster on a subject akin to the matter alleged to be libellous, the defendants, believing the truth of the statements made to them, made use of the information so given to them, with the view of counter-acting the attacks made in said newspaper upon the said Dr. Sangster; and that they published the information, so given to them, without malice, and believing the same to be true.

In the same Term *M. C. Cameron*, Q.C., and *Harrison*, Q.C., shewed cause. There is no sufficient evidence before the Court that the defendants printed and published the libel. There is nothing to connect it with the defendants. The papers containing the libels should have been attached to the applicant's affidavits, and the libellous matter specifically denied; a general denial as here is not sufficient. The reference to the affidavit of Roberts is clearly insufficient. It refers to the affidavit as "filed on this application," and while the affidavit is made on the 22nd, the application is not made until the 24th, two days after; also, Roberts's affidavit, although dated on the same day as the applicant's, might not have been made until afterwards. The affidavits are clearly defective: *Regina v. Baldwin*, 8 A. & E. 168; *Regina v. Woolmer*, 12 A. & E. 422; *Regina v. Stanger*, L. R. 6 Q. B. 352. The modern cases shew that the Courts are averse to granting these informations, for the ordinary remedy by indictment should be pursued, and that an information will not be granted in the case of private persons, but only where the party occupies some position of dignity; all that is known here is that the applicant is the proprietor of a newspaper, and is designated in his affidavit as "Esquire": *Ex parte Dale*, 2 C. L. R. 870; *Ex parte Smith*, 21 L. T. N. S. 294; *Regina v. Aunger*, 28 L. T. N. S. 630. The cases also shew that the defendants must have been actuated by malice, and it clearly appears here, from the defendants' oaths, that they were not so actuated, but that the statements were made in good faith,

believing them to be true, and in what they conceived to be their right, and in the public interest: *Ex parte Smith*, 21 L. T. N. S. 294; *Cooke on Defamation*, 60-3; *Kelly v. Sherlock*, L. R. 1 Q. B. 686. It is also shewn that the applicant is in the habit of attacking the personal and private character of those politically opposed to him, and having so attacked Dr. Sangster on a matter similar to this, the defendants, believing the alleged libel to be true, published it with a view of counteracting the attack on Sangster. The rule *nisi* also is defective, as it should have been stated to have been on the application of counsel for the applicant, and not, as here, for the Crown.

J. H. Cameron, Q.C., contra. There is clearly sufficient evidence of the publication. The applicant in his affidavit swears that the defendants are printers and publishers of the paper, and refers to the affidavit of Roberts, "filed on this application." This can only mean the application about to be made; and to Roberts's affidavit is annexed a copy of the paper. There is no question but that the affidavits are good, and they are drawn up in accordance with the rules laid down in the practice books, such as *Cooke on Defamation*. The cases referred to on the other side do not apply, as in them there clearly was no evidence of publication. The libels here are of the most atrocious character; there could not be a stronger case for the interference of the Court; and the case of *Norwood v. Plimsol* shews that the application may be made by a private person. As to the defendants' affidavit, it is no answer. It attempts to set off some statements made in the applicant's paper against Dr. Sangster, but we have nothing to do with Dr. Sangster here. The defendants also, instead of apologising or retracting the libel, have reiterated it, stating that they are prepared to prove it. There is nothing in the objection that the rule *nisi* is drawn up on the application of counsel for the Crown instead of for the applicants. However, the Court, if necessary, should allow an amendment to be made.

HAGARTY, C. J., delivered the judgment of the Court.

It was objected that the applicant's affidavit was defective in referring to the affidavit of Roberts as "filed on this application"—the application not being then made or for two days after; and also objections were taken to the allegations as to publication by these defendants being insufficient, and *Regina v. Baldwin*, 8 A. & E. 168; *Regina v. Woolmer*, 12 A. & E. 422; *Ex parte Smith*, 21 L. T. N. S. 294; *Ex parte Dale*, 2 C. L. R. 879, 28 L. & Eq. Rep. 165; *Regina v. Stanger*, L. R. 6 Q. B. 352, were referred to.

The case of *Regina v. Baldwin* was very different from the present. The affidavits stated that the defendant was the printer of a newspaper called the *Standard*, and did on, &c., insert and print in said newspaper a certain scandalous libel, &c.; a copy of which said libel is hereto annexed, &c. The newspaper was annexed to the affidavit.

The Court held that there should be proof of publication by the defendants distinctly given.

Patteson, J., adds, at page 170, "There is an express statutory provision as to the proof in such cases. If parties will not adopt that, they must shew publication by some direct proof, as that a party bought the libel in defendant's shop."

In *Regina v. Woolmer* the affidavits contained the stamp office certificate, verifying the declaration delivered to the office, whereby it appeared that defendants stated they were printers, publishers, and sole proprietors of a newspaper named therein. When the motion was made, a newspaper was exhibited to the Court corresponding with the declaration, and containing the passage complained of. It was not, however, annexed to any of the affidavits nor filed, and the rule was drawn up only on reading certain affidavits and other papers thereto annexed.

The Court held this insufficient: that the newspaper should be filed with the affidavits; and that it was essential the rule should be drawn up on reading it.

In *Regina v. Stanger*, L. R. 6 Q. B. 352, it was held that it was not sufficient to swear that defendant was, as deponent believed, the publisher of the newspaper.

Blackburn, J., says that information and belief is not sufficient evidence that the defendant was the publisher of the libel.

The case before us is, we think, free from these objections. The newspapers are filed, and the rule drawn up on reading them.

Mr. M. C. Cameron's objection that the reference to affidavits filed on this application cannot be supported, or properly be held to refer to affidavits not filed till two days after.

We think "filed on this application" naturally means—there being only one application—the application about being made or to be made on these affidavits.

Nothing but the most distinct authority, binding upon us, should, we think, induce us to give effect to such an objection.

We see nothing in the objection that the rule is moved by counsel for the Crown.

It was also urged that we should consider the position in life of the applicant as simply described as an "Esquire," and *Ex parte Dale*, 2 C. L. R. 879, 28 L. & Eq. R. 165, was cited. We have seen two reports of that case, and find no such doctrine laid down. It is merely to the effect that the Court will not grant the rule on a libel in a private letter addressed to the relator.

Ex parte Smith, 21 L. T. N. S. 294, merely shews that where a newspaper had published a severe article as to the guilt of a man charged with the murder of his wife, for which he was afterwards tried and convicted of manslaughter, an application for a criminal information, subsequently made to the Court, was refused, as under the circumstances, and after what had taken place, it was not a case for the interference of the Court.

We do not think that any thing stated in the defendants' affidavit should prevent our acceding to the present application, if it be otherwise entitled to succeed.

The statements respecting Sangster seem quite beside the question. It may or may not have been, for all that we can know judicially, right and proper to have made the statements referred to as to him. Nor can we know any thing on the information before us, as to the propriety or impropriety of the alleged attacks upon the characters of persons said to be politically opposed to the applicant.

We have examined the late case of *Regina v. Aunger*, 28 L. T. N. S. 630, and the remarks of Blackburn, J., as to the discretion of the Court in refusing, in certain cases, to allow this prerogative proceeding. In that case one of the specific charges had not been sufficiently met, and the alleged libel was of a political and public character. Here it is wholly of a private and domestic nature.

It is sufficient for us to say that there is nothing laid before us on this application to warrant our making an exception against the applicant, and refusing to him the leave of this Court to file a criminal information for this reiterated publication in a newspaper of matter not pretended either to be not libellous, or to be true in fact.

Our judgment is that the rule be made absolute.

Rule absolute.

FEAVER V. THE MONTREAL TELEGRAPH COMPANY.

Principal and agent—Telegraph Cos.—Liability of.

Held, that a contract may be made, through the medium of an agent, with a telegraph company for the transmission of a message, and where the principal sustains loss through the negligence of the company, he may maintain an action against them therefor.

The person to whom a telegram was sent by his agent was held entitled to sue the telegraph company for negligence in the transmission of it.

THIS was an action against the defendants for negligence in the transmission of a telegram. The declaration charged that the defendants carried on the business of transmitting

messages by telegraph for reward to the defendants, and thereupon, in consideration that one Thomas Feaver, on behalf of the plaintiff, would pay to the defendants \$1.00, the defendants promised the plaintiff that they would transmit correctly from Hamilton, in the Province of Ontario, to the plaintiff, at Wakefield depot, a certain message; and it was alleged that the defendants did not correctly transmit to the plaintiff the said message, whereby the plaintiff sustained damage.

The cause was tried before Morrison, J., and a jury, at Hamilton, at the Winter Assizes of 1874.

The plaintiff was called as a witness, and stated that on the 21st of September she called at the defendants' office in Hamilton, and asked whether they could telegraph to Wakefield, and the clerk, after a search, said that they could by sending it to Reading, and then to Wakefield. He said the charge would be seventy-five cents, and the plaintiff said her brother would send one the day after.

The plaintiff's brother corroborated the plaintiff's statement as to what took place about telegraphing; and that on the 23rd he went to the defendants' office at the Great Western Railway depot, about eight p.m., and sent the message to Wakefield depot, to be called for. The charge was 85 cents—60 cents to Boston, 15 cents to Reading, and say 10 cents to Wakefield—which he paid, but the clerk said if he called again he would give him the difference, if not so much.

At the conclusion of the plaintiff's case, the learned Judge nonsuited the plaintiff, upon the ground that the liability of these defendants, if any, rested upon a contract made with the plaintiff; and that he saw no evidence of any contract with her, or through an agent, so as to affect the defendants.

In Hilary Term *Mackelcan* obtained a rule *nisi* to set aside the nonsuit, on the ground that there was sufficient evidence to go to the jury in support of the plaintiff's case.

In this term *Rae* shewed cause. The evidence shews that the contract was made with, and the consideration

moved from, Thomas Feaver, the sender of the telegram, and not with the plaintiff or as her agent; and, according to *Playford v. United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706, she cannot recover. See also *Henkel v. Pape*, L. R. 6 Ex. 7; *Stevenson v. Montreal Telegraph Co.*, 16 U. C. R. 530.

Mackelcan, contra. It is quite clear that the plaintiff made the contract with the defendants, and that the sender, Thomas Feaver, simply acted as her agent in sending it. In *Playford v. United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706, it is expressly said that if it had been proved that the sender was the plaintiff's agent, he would have been entitled to recover. The nonsuit was clearly wrong, and should be set aside.

GALT, J., delivered the judgment of the Court.

Unless we are prepared to hold that no contract can be made with a Telegraph Company through the medium of an agent, this nonsuit cannot be sustained. When we consider how largely telegraphic communication enters into every description of business in this country, it would be a startling doctrine to persons engaged in commercial transactions to be told that no action can be maintained against a Telegraph Company for negligence, except the person injured was himself the party who actually took the message to the Company's office.

Suppose, for example, a merchant in Toronto sent one of his clerks to Chicago with instructions to inform him by telegraph of the state of the market there, and that by the negligence of the Telegraph Company erroneous information was transmitted, whereby the merchant sustained loss, it is plain the clerk could maintain no action, as he would suffer no loss; would, then, his employer be without remedy, because the contract was one with the clerk personally? I do not apprehend that such is the law. I take it that in this case, the same as in all others, the question is, with whom was the contract made, and that there is no reason why a person cannot act through an agent.

The question would then arise, was the person transmitting the message the agent of the person to whom it was addressed, and this would be a question for the jury.

In *Playford v. United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706, it does not appear to have occurred to the Court that such a proposition could be maintained, for throughout their judgment they discuss the question of agency, and the case turned on the view which was taken of the position of the parties telegraphing, which they held to be that of seller and buyer, and not of principal and agent. They say, at page 714, "The only question therefore is, with whom was the contract made? And to this there can be but one answer. It was made with Messrs. Rice & Hellyer. The offer was sent by them on their own behalf and in their own interest. In so doing they acted, it is true, on the invitation of the plaintiff, but *not as his agents or as representing him.*"

We are of opinion that the evidence of the plaintiff and her brother ought to have been submitted to the jury, and consequently that the nonsuit should be set aside.

Rule absolute.

CORNISH V. THE NIAGARA DISTRICT BANK.

Notes deposited as collateral security—Payment of principal note—Trove collaterals — 26 Vic. ch. 45, sec. 2—Construction of—Money had and received.

Certain sale notes were deposited with defendants as collateral security for the payment of a note, endorsed by the plaintiff for the accommodation of one M., and discounted by defendants for M. The collaterals were of the same value as the principal note, and were to be paid into the bank and applied on the note, so that when they were paid, the note also was to be paid and the plaintiff's liability to cease. After the principal note became due, defendants denied that they held the sale notes as collaterals and refused to give the plaintiff any information as to what had been paid on them; and the plaintiff then paid the note in full and demanded an assignment of the collaterals, the plaintiff's payment being made by a part payment in cash, and his note for the balance which he paid at maturity.

Held that the plaintiff could not maintain trover against defendants for the collaterals; for although under 26 Vic. ch. 45, sec. 2, he was entitled to the immediate possession of them, he had not until assignment any property in them vested in him.

Semle, that the plaintiff's remedy would be by a special action on the case against defendants for not assigning the notes to him after demand duly made.

Held, however that plaintiff was entitled to recover as money had and received to his use, the amount paid to defendants on the collaterals, and that the fact of his only paying part of the principal note in cash and giving his note for the balance did not take away his right.

Semle, also, that his right would not be affected even if the payment on the collaterals were after his payment.

DECLARATION. First count: trover for the conversion of certain promissory notes. Second count: common count.

Pleas. To the first count: not guilty; and a denial that the notes were the plaintiff's.

To the common counts: never indebted, and payment.

The cause was tried before Morrison, J., and a jury, at London, at the Spring Assizes of 1874.

It appeared that one Amos, who had an account with the defendants, applied to their agent for a discount, and proposed to deposit with him certain sale notes, the subject of the present suit, as collateral security. The agent declined to make this arrangement, but said he was willing to discount a note for Amos, provided he furnished a good endorser, and also sent the other notes. Upon this Amos applied to the plaintiff, who agreed to become the endorser,

and Amos enclosed this note, together with the other notes, to the Bank. When the note, which was for \$620.60, was about to fall due, it was renewed in full. The renewal was also renewed in full.

According to Amos's evidence, the sale notes amounted to the sum of \$620.60, the same sum as the discounted note, and he stated that the reason why he got the note discounted for the same amount was, that the defendants' agent said he would carry him through with the note until the sale notes fell due, so that when the sale notes were paid to the Bank the plaintiff's liability as endorser would be gone, and the note paid.

The last renewal was on the 13th September, 1872, and fell due on 16th November, 1872, on which day it was protested.

In December Amos went with the plaintiff to the agent to see why this protest had been sent, and said to him, "You know that when these sale notes were paid, the plaintiff was entitled to get his note." The agent replied that he had passed them to Amos's account generally.

The agent was called for the defence, and expressly denied that any notes were left as collateral security for the note of \$620.60, but that they were left to apply on Amos's account generally.

The plaintiff, in his evidence, stated as follows: "The note spoken of by the witness," (Amos), "for \$620.60, I endorsed on his representation that he would place sale notes with the Bank to retire it and protect it. I saw Mr. Chadwick, the agent, having received a protest of the last renewal on 27th November. I mentioned I had got a protest, and I told him that I understood that the sale notes, when paid, would pay the note of \$620.60. He then said that that was the case with a \$400 note, and he did not deny as to the other note. I then asked to let the note stand to the end of the following week. He assented. I did so, to go and see Amos about the matter. I saw him, and went to the Bank on the Saturday, and as Amos had not come, and not knowing whether these sale notes were there or paid, I

paid the manager \$175 on it. I afterwards met Amos and went to the Bank, when Amos told Mr. Chadwick that these sale notes had been left to pay this note. Mr. Chadwick said: 'They are placed to your account,' and would give no other information. After the payment of \$175, I gave my own note for the balance of the \$620.60 to the Manager, and I paid it when it fell due. I then demanded the unpaid collaterals, that is, the sale notes. He said there were none, and I demanded the proceeds of these notes; and he said he applied them otherwise; telling him I would take steps to recover them, as I would pay my own note then, which I did."

The Manager, as already stated, denied that the sale notes had been left as collaterals for this note of \$620.60, but for Amos's general account, and that they had been so applied.

On behalf of the defendants it was objected, that the plaintiff could not recover, on the ground that there was no right of property in the plaintiff, and so no right to get the notes or the proceeds; and that the plaintiff's payment was voluntary, and therefore no ground for the action.

The learned Judge overruled the objections, but reserved leave to the defendants to move to enter a nonsuit.

It was left to the jury to say whether the sale notes in question were left with and received by the Bank as collateral security, and their proceeds to be applied to the payment of the \$620.60 specifically; and they were directed, if they found such was the case, to find for the plaintiff; but if they thought otherwise, to find for the defendants.

The jury found a verdict for the plaintiff for \$447.16 the amount received by the defendants upon the collateral notes.

In Easter Term *Patterson*, Q.C., obtained a rule *nisi* to enter a nonsuit pursuant to the leave reserved, or for a new trial on the law and evidence.

In this term *McMillan* shewed cause. The evidence

shews that the sale notes were deposited with the Bank as collateral security for the note endorsed by the plaintiff, and not for Amos's general indebtedness. This was expressly left to the jury, and they found for the plaintiff. Under 26 Vic. ch. 45, where the surety pays the debt of his principal, he is entitled to have assigned to him all the securities held by the creditor for the debt. The plaintiff, therefore, having paid the note, was entitled to have the collaterals delivered to him, and may, therefore, maintain trover. The plaintiff, moreover, is entitled to recover, under the common counts, the amount received by the defendants on the collaterals as money paid to his use. As to the amount being paid voluntarily, it was only so paid after the defendants denied that they held them as collaterals and refused to give the plaintiff any information.

Beaty, Q.C., contra. The plaintiff cannot recover on the count for trover, as he had neither the right of possession nor of property in the notes, and even if the 36 Vic. ch. 45 gave him the right of possession he still had no property in them. The payment made by the plaintiff was voluntary, and therefore he cannot recover under the common counts: *De Colyar* on Guarantees, 260.

GALT, J., delivered the judgment of the Court.

A careful consideration of the evidence satisfies me that the view taken by the jury of the facts of this case was the true one.

The Manager, in his testimony, states, what I have little doubt may be correct, namely, that he does not recollect how these sales notes came into possession of the Bank, whereas Amos deposed positively to all the circumstances; and, in my opinion, so far from the verdict being contrary to the weight of evidence, it is fully in accord with it.

But it was objected that the plaintiff could not recover in this action, no right of property in the collateral notes being in him.

The 26 Vic. ch. 45, sec. 2, declares that "every person who, being a surety for the debt or duty of another, shall

pay such debt or perform such duty, shall be entitled to have assigned to him or a trustee for him every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty."

The verdict of the jury having established that the notes mentioned in the first count of the declaration were left specially as collateral to the note upon which the plaintiff became surety for Amos, who deposited the collaterals and whose property they were, we may hold that under the statute the plaintiff would be entitled to have immediate possession of these collaterals, or at least of such of them as have not been paid, delivered to him. Yet we cannot say that the property in them would be vested in the plaintiff until they should be assigned and transferred to him under the provisions of the statute; and as both the right of property and the right to the immediate possession must concur in the plaintiff to entitle him to maintain trover, the verdict upon the first count cannot be sustained.

The plaintiff's remedy for any of the notes not yet paid to the Bank would seem to be by special action on the case against the defendants for not assigning and transferring the notes to the plaintiff after demand duly made in that behalf, as pointed out in *Phillips v. Dickson*, 8 C. B. N. S 391.

However, the plaintiff has, in his declaration, a count for money had and received to his use, and the amount recovered, namely, \$447.16, is the amount admitted to have been received by the defendants upon some of the notes, which the jury have found to have been held by them as collateral specially to the note upon which the plaintiff was surety, and which they have collected; and the plaintiff insists that he is entitled to retain his verdict for this amount, upon the count for money had and received.

Assuming it to be clearly established, as upon this verdict we do, that the notes were left with the defendants specially collateral to the note upon which the plaintiff was originally endorser, and the proceeds to be applied as received towards satisfaction of the note whereon the plain-

tiff was endorser ; and assuming all the collaterals (which, together, were precisely equal in amount to the principal note), to have been paid to the creditor before the surety paid the amount secured by the note of the principal debtor, and that the whole of the principal debt was thus paid and satisfied out of the collaterals, and that, notwithstanding, the creditor, upon the assertion that he never had any collaterals to the principal note, should demand and receive payment of the principal debt from the surety, is there any principle of law which, in such a case, would prevent the surety from recovering back, under the count for money had and received, the money so illegally demanded of and taken from him ? So likewise, if part only of the principal debt is satisfied out of the collaterals, and upon the like assertion, which the jury find to be untrue, the creditor should demand and receive, notwithstanding, the whole of the principal debt from the surety, is there any principle of law which would prevent his recovering back the amount so demanded and received from him in excess of the amount which, having regard to the amount received by the creditor from the collaterals, was *ex æquo et bono* chargeable to the surety ?

True it is that the collaterals when paid to the creditor, if so paid before the surety has paid the principal debt cannot be said to be *then* moneys received by the creditor to the use of the surety. Such moneys were received to the use of the principal debtor, to be applied specially towards satisfaction of the debt for which the surety became security ; but when the creditor, after receiving payment and satisfaction of the principal debt in whole or in part out of the collaterals, wrongfully demands and receives payment of the whole of the principal debt over again from the surety, the money so paid, the moment it is paid, becomes money in the hands of the creditor to the use of the person so wrongfully required to pay it, who, as I think, can maintain an action for money had and received to recover back so much of the money so paid as he should not have been required to pay, by reason of the principal debt having been, in part, satisfied out of the collaterals.

Now, in the case before us, at the time that the plaintiff paid the \$175, and gave his own note for the balance, the plaintiff insisted that the notes in question were held by the defendants as collateral specially to the note upon which the plaintiff was surety. This the defendants denied, and, as we must now hold, untruly denied, and they refused to give to the plaintiff any information as to how much had been paid, and how many of the notes and for what amount still remained in their hands unpaid. The plaintiff was thus placed in the position that, in order to perfect his title to claim the collaterals, he must pay up the principal note upon which he was surety in full, as demanded by the Bank, whom he could not otherwise make responsible to himself. He was thus placed in a position of being obliged to yield to the demand of the Bank, in order to be able most effectually to assert his own rights. If he had at that time paid up the whole of the principal debt in cash, there is no doubt that, as to the collaterals not yet paid to the Bank, the plaintiff would have had his remedy under the statute, and as to the amount which had been received by the Bank out of collaterals paid, he would have had his action for money had and received: *Shaw v. Woodcock*, 7 B. & C. 73.

Then, does it make any difference that, instead of paying up the principal note wholly in cash, the plaintiff paid it by \$175 in cash, and by his own note at two months, which was accepted, for the balance? I think not. If, indeed, it was pretended that at the time of this transaction taking place something passed, exhibiting a plain intention upon the part of the plaintiff to waive and abandon all claim whatever he may have had to the collaterals, this might make a difference; but no suggestion of the kind was made at the trial nor during the argument before us, unless the mere fact of getting the two months for payment of the balance of the debt constitutes in law such a waiver; and as a proposition of law, I do not think it can be held to have any such effect, for it was the wrong of the defendants, as we must now hold, that occasioned any necessity for the plain-

tiff paying the principal debt at all, or for his giving any note.

Being obliged to pay the principal debt before he could assert his right to the collaterals, he was wrongfully placed at a disadvantage by the defendants. It was their untrue assertion that they did not hold the notes in question as collateral security for the note upon which he was surety which compelled him to yield to their demand, which we must now hold to have been unjust.

If, then, the assertion and demand of the defendants was, as we must now hold it to have been, unjust in requiring payment from the plaintiff of the note whereon he was surety, and which payment he would have to submit to in order to acquire a position effectually to assert the rights for which he was contending, how can, in law, the fact that the defendants, upon receipt of \$175 in cash, gave the plaintiff two months to pay the balance of their unjust demand, deprive him of his right of action to seek redress for the wrong?

The defendants were in no sense prejudiced by the delay involved in the two months that the plaintiff's note had to run. Had they objected to take the plaintiff's note for the balance, and had sued him upon the old note, it now appears that they must have failed to the extent of the moneys received by them upon the collaterals.

The defendants being, as we must now hold them to have been, *well aware* of the fact that they held the collaterals specially to secure the debt for which the plaintiff was surety, (of the truth of which the plaintiff had no knowledge, save from the information of the principal debtor), were the wrong-doers throughout, in obtaining payment from the plaintiff of a sum of money, which we must now hold that the defendants had, in truth and in fact, no right to demand.

The evidence does not shew whether any of these collaterals were paid up after the plaintiff took up his own note; but, if this would make any difference, the defendants have made no point of it, either at the trial or on

the argument here. The defendants acknowledged having received the money; but they did not say, nor did it appear, that the whole amount which the defendants received out of the collaterals was not so received by them before the plaintiff paid the \$175, and gave his own note for the balance, and as the defendants rested their whole defence upon the contention that they did not hold the notes at all as collateral to the note upon which the plaintiff was surety, which has been found against them, I do not think we are called upon to suggest difficulties, if this be a difficulty, in the way of the plaintiff's recovery, not at all relied upon by the defendants.

Moreover, it appears to me that if the defendants did receive any of these moneys after the plaintiff became entitled under the statute to have the collaterals assigned to him, moneys so received may be said to be in the defendants' hands to the use of the person entitled to have an assignment of the security upon which the money has been paid.

The rule will be to enter a nonsuit upon the first count, and to enter the plaintiff's verdict upon the count for money had and received.

Rule accordingly.

JAFFREY V. THE TORONTO, GREY AND BRUCE RAILWAY
COMPANY.

In an action against a railway company for negligently allowing dry wood and other combustible matter to accumulate on their land, which was set on fire by their engine, and extended to plaintiff's property: *Held*, that defendants were not protected by the statutes 6 Anne ch. 31, and 14 Geo. III. ch 78.

The authorities upon this question reviewed. Per Gwynne, J.—The statutes are not excluded in all cases where the fire is caused by negligence, but they do not apply where it has been intentionally lighted by defendant.

Held, under the circumstances of this case, set out below—the railroad having been recently built through the forest, and the plaintiff's land being in a state of nature—that there was no sufficient evidence of negligence on the defendant's part, and a second verdict having been found for the plaintiff, a new trial was granted.

DECLARATION. First count: that through the careless, negligent, and improper management, by the defendants and their servants, of a certain fire engine, then being propelled by them along their railway, fire escaped therefrom and settled in the woods and fields of the plaintiff adjoining the defendants' railway, and burned and destroyed a large quantity of trees, timber, rails, cordwood, fences, grass, and crops of the plaintiff.

Second count: that the defendants and their servants wrongfully permitted to remain upon their railway track certain fire, in a careless, negligent, and improper manner, and at a time when, by reason of the state of the wind and weather, it was dangerous and improper to do so; whereby, and for want of due and proper care and caution on the part of the defendants and their servants, the fire extended itself from and out of the said railway into the plaintiff's close adjoining, and burned, consumed, and destroyed his trees, timber, grass, and crops, &c.

Third count: that the defendants were possessed of a strip of land, lying between their track and the plaintiff's close adjoining, on which strip there was grass growing, and on which the defendants had negligently allowed to accumulate dry wood, leaves, weeds,

and other substances of a very combustible nature, and in which from time to time fell, as defendants well knew, hot ashes, cinders, and fire out of defendants' engine going along the defendants' track; and there was great danger, as defendants well knew, that such grass, dry wood, leaves, weeds, and other substances would take fire, unless the same were removed, or due precaution taken by the defendants against their being so set on fire; yet the defendants so negligently kept the said strip of land, and permitted it to be in such a state, that the grass, dry wood, leaves, and weeds took fire from the said hot ashes, cinders, or fire from the engine of defendants; and thereby, and for want of due precaution by the defendants to prevent such fire from spreading to the plaintiff's land, and by their negligent omission thereof, the said fire extended to the plaintiff's land, and his trees, timber, fences, grass, and crops thereon were burned and destroyed.

The defendants pleaded not guilty, by Consol. Stat., C., 66, sec. 83.

Issue.

The cause was tried before Hagarty, C. J., C. P., and a jury, at Brompton, at the Spring Assizes of 1874.

At the trial it appeared to be admitted that the defendants were not guilty of either of the grievances complained of in the first and second counts. No evidence was offered of any neglect in omitting to use all the precautions known to science for preventing the escape of fire.

It was admitted that the defendants were entitled to a verdict upon the first and second counts; and the plaintiff rested his case wholly upon the third count.

Upon the evidence it appeared that the defendants' track was newly laid through the forest, trains having first run in 1871, and the injury complained of was sustained in August, 1872.

The plaintiff himself, being called as a witness, said that he did not himself see the fire until it had been burning for three days. He said that the track was in a bad state, and as evidence thereof, he said there were timber, wood,

logs, and stumps upon it; that he counted 180 stumps in 100 rods.

One Robert Hume was the first who saw the fire. He said that he saw the 11 a. m. train going up: that there was no fire until the train passed; and that in a few minutes after the train passed he saw the fire. He first saw it in the railway fences. It spread rapidly into the plaintiff's bush. He was about 40 or 50 rods off. He went up to the place about an hour after the fire started. The fences and the plaintiff's bush were all on fire. There was rubbish and dirt all over on the track, and in the plaintiff's wood; a good bit on the track lying all over, except where there was gravel.

James Robson stated that as he was coming up from his dinner he saw the fire about a quarter of a mile off. He got up to it about a quarter of an hour after it broke out. When he got up there were bright coals along the track. They seemed the remains of an old log, one end of which was about a foot from the fence. The log lay from the fence towards the railway ditch. There was long grass, pretty dry, growing along the track. Chips were lying about, and at the time of the trial he said there was a log heap still unburned, about twenty feet from the log. When witness got up to the fire, there was fire in the plaintiff's close, and the fire was burning all along the log, which was about six feet long. The grass was also on fire.

Aaron Huck stated that he got up to the fire before Robson. When Huck, who was the first there, got up, the fences were on fire, and the fire was spreading rapidly easterly. There was, he said, a good deal of rubbish, consisting of chips, logs, and wild grass. He did not speak of any of this rubbish being on fire.

Robert Huck stated that he got up after Aaron. When he got up, there was a fresh fire on the track side in the chips, logs, &c. At that time the fire was well into the plaintiff's bush, and full fifty panels of the defendants' fence had been destroyed. The fire burned into the track, in some places six feet, in some places only one foot.

Mrs. Robson stated that she got up to the fire a little after 12 o'clock. At that time the rubbish inside the track was burning.

Joseph Green stated that he got up to the fire about 1 o'clock. When he got there 15 rods of the fences had been burned. The fire was then also on the side of the track ; logs, chips, and grass were on fire. The track, he said, had never been properly cleaned up.

James Newlove stated that he was seven-eighths of a mile from the place where the fire broke out when the train passed. He saw it pass, and shortly after saw smoke arise as from a stove pipe, from one particular spot, which he considered to be on the track.

Seth Wilson stated that he got up to the fire about 1 o'clock. At that time the fence was much burned, and an old log, running from the fence to the ditch. About two or three acres of the plaintiff's place was then burned over. There was, he said, much rubbish on the track. It was anything but clean.

At the close of this evidence it was objected by the counsel for the defendants that there was no evidence that the fire originated on the track so as to make the defendants liable ; that the evidence was that the fire originated in the fence, where it was first seen. It was also contended that the fire was accidental within the protection of 14 Geo. III. ch. 78 sec. 86 ; and leave was reserved to move to enter a nonsuit on these grounds.

The learned Chief Justice left it to the jury to say whether the fire originated on the track, or in the fence, or inside the plaintiff's land ; and whether the damage was caused by the improper state of the track, that is, from its not being kept in a reasonably clean or careful state. He told the jury that they were to take into consideration the recent construction of the road, and they were to say whether the track was kept in a reasonably fair state under all the circumstances, and if not, was the damage which the plaintiff sustained caused by the defendants' neglect in not keeping it as they ought.

The jury found for the defendants on the first and second counts, and for the plaintiff on the third count, with \$650 damages. They also found that the fire originated in the log on the railroad, and that the company's grounds were in a dirty and improper condition.

In Easter term *Lash* obtained a rule *nisi* to set aside the verdict entered for the plaintiff on the third count, and to enter a nonsuit, pursuant to the leave reserved at the trial, on the objections taken at the trial.

In the same term, *Harrison*, Q. C., shewed cause. The previous rule in this case (*a*), was made absolute for the purpose of raising the question of the application of Statute 14 Geo. III., ch. 78, sec. 86, to railway companies, and at the last trial this was really the only point raised and which has now to be considered. The Statute clearly does not apply, as it is merely a local Act, affecting a Metropolitan District in London, and not the realm generally. The preamble plainly shews this. Also, as the fire is proved to have been intentionally lighted, it is not an accidental fire in its origin with the Act: *Filliter v. Phippard*, 11 Q. B. 358. It is laid down that the Statute does not apply, as in this case, where fire originates in the use of a dangerous instrument knowingly used by the owner of the land in which the fire breaks out: *Vaughan v. Taff Vale R. W. Co.*, 3 H. & N. 752. Also as railway companies were not in existence, or even thought of, when the Act was passed, it can hardly be said that the Legislature had them then in contemplation. In *Smith v. London and South Western R. W. Co.*, L. R. 5 C. P. 98, L. R. 6 C. P. 14, where the facts are almost identical, the question of the Statute was never raised, and therefore it must be taken for granted that it was considered inapplicable. The case of *Gaston v. Wald* 19 U. C. R. 586 is not law, and is opposed to *Filliter v. Phippard*.

Lash contra. The Act is not merely local, but general

(a) *Jaffray v. Toronto, Grey, and Bruce R. W. Co.*, 23 C. P. 553.

in its application: *Stinson v. Pinnock*, 16 Grant 684. It is, however, contended that the fire was intentionally lighted, and is, therefore, not an accidental fire in its origin with the Statute, but as the Legislature have authorized the defendants to use their engines for the purpose of locomotion, and so to kindle fire in the fire box, it cannot be said that the kindling of the fire in the fire box is intentional within the Act. The origin of the fire, within the Statute, would refer not to the original fire started in the fire box, but to the fire which caused the injury to plaintiff—namely, the hot cinders falling from the fire box,—and this was clearly accidental, for it is admitted that the defendants used all precautions known to science to prevent the escape of fire; and it makes no difference that the track was in a combustible state. The case of *Gaston v. Wald*, 19 U. C. R. 586 is not distinguishable from the present case, and until it is overruled in appeal, the Court is bound by it. The case of *Vaughan v. Taff Vale R. W. Co.*, 3 H. & N. 752, relied upon by the plaintiff, was reversed in appeal: 5 H. & N. 679. In *Filliter v. Phippard*, 11 Q. B. 347, there was negligence in lighting the fire, while here the Legislature have authorized it.

GWYNNE, J.—Sir William Blackstone, in his Commentaries, plainly expresses the opinion that these Acts, 6 Anne ch. 31, and 14 Geo. III. ch. 78 sec. 86, afforded protection, although the fire should be occasioned by the negligence of the party.

The point arose expressly in *Viscount Canterbury v. Attorney-General*, 1 Phillips 306, and was argued but not decided.

Lord Lyndhurst there, in giving judgment, at page 315, quotes Sir William Blackstone in his Commentaries, wherein he says: "By the common law, if a servant kept his master's fire negligently so that his neighbour's house was burned down thereby, an action lay against the master. But now, by Statute 6 Anne ch. 31, the common law is altered, for the statute ordains that no action shall be maintained

against any in whose house or chamber any fire shall accidentally begin." Lord Lyndhurst, referring to this, then proceeds:—"He thus states it distinctly as his opinion that for a fire in a dwelling house, originating in the negligence either of himself or his servant, the master is not responsible." And he adds: "Although this work" (Blackstone's Commentaries) "has gone through many editions and been subjected to much criticism, no observation, that I can find, has ever been made upon this passage, or any objection urged against it. I may further observe," he adds, "that although cases of damage from the burning of houses occasioned by negligence have, doubtless, frequently occurred since the Statute, I do not recollect, in the course of a pretty long professional life, any instance of an action having been brought to recover compensation for this species of injury, nor do I find in the books any trace of such a proceeding."

A case, tried before Baron Alderson, for negligence by the defendant in burning weeds, was referred to as at variance with Sir William Blackstone's opinion. Upon this Lord Lyndhurst says: "Some decisions were cited in support of the construction contended for by the petitioner. An action was tried before Mr. Baron Alderson, at the Assizes for Berkshire a few years since, for negligence by the defendant in burning weeds in his field, whereby an adjoining plantation was destroyed. The jury, under the direction of the learned Judge, found a verdict for the plaintiff. The foundation of this action was negligence; and if the Statute of Anne, and consequently the 14 Geo. III. ch. 78, would have exempted the owner of a house from the consequence of his negligence, the latter statute would have protected the defendant in this instance. This, therefore, it was said, was a direct authority against the construction put upon the statute of Anne by Sir William Blackstone. It is true," he says, "that this was a *nisi prius* decision; but the case was afterwards cited in the Common Pleas, in *Vaughan v. Menlove*, 4 Scott 244, and appeared to have the sanction of the judges of that Court.

But the case of *Vaughan v. Menlove*, 4 Scott 244," he proceeds; "was also an authority to the same effect. The defendant had negligently managed a stack of hay on his premises, in consequence of which it took fire, and the plaintiff's property was thereby destroyed. By the statute a party on whose estate a fire shall accidentally begin shall not be liable to an action for any damage which may be thereby occasioned. Sir William Blackstone's construction is, that although the fire be occasioned by the negligence of the party, he shall not be liable. In this case, however," he adds, "the Court of Common Pleas decided otherwise, and judgment was given for the plaintiff."

Now, with the utmost deference to this so great authority, I cannot but say that neither can the case referred to as having been tried before Baron Alderson, nor that of *Vaughan v. Menlove* itself, be fairly cited as authorities in antagonism with the opinion of Sir William Blackstone; nor can these cases be taken to be authorities affecting the question whether or not a person upon whose premises a fire arises, having its origin in negligence, which extends into and destroys a neighbour's property, is by reason of the fire being traceable to negligence deprived of all protection under the Act.

Both these cases stand, as it appears to me, on a different principle, which excludes the application of the Act, without reference to the fact that the fire originated in negligence.

The case before Baron Alderson was the case of a fire wilfully made by a person for burning weeds in his own field, which extended and set fire to a plantation adjoining. To such a case the language of the Act 14 Geo. III. ch. 78, sec. 86 is, as is expressly decided by the Queen's Bench in *Filliter v. Phippard*, 11 Q. B. 358, wholly inapplicable. The words of the Act relate to a fire beginning *accidentally* on the estate of him from whose estate it spreads, and not to one *knowingly* and *intentionally* lighted by the defendant himself.

So in *Vaughan v. Menlove*, Tindal, C. J., in giving

judgment, as reported in 4 Scott 251, the report to which Lord Lyndhurst made reference, says: "*Under the particular circumstances of this case, I feel no hesitation in holding the defendant to have been as much the raiser of the fire as if he had put a lighted match to the hay-rick ; for,*" he adds, "it is well known that hay stacked in a green or damp condition will from natural causes ferment and ignite."

There he likens the case to *Tubervil v. Stamp*, 1 Salk. 13, which was the case of a fire intentionally lighted by the defendant in his own close, which extended to his neighbour's, and burned his crops.

Now the particular circumstances in *Vaughan v. Menlove*, we find by the judgment of Vaughan, J., to have been, that the condition of the stack, and the probable and almost inevitable consequence of permitting it to remain in its then state being pointed out to the defendant, he abstained from the exercise of the precautionary measures that common prudence and foresight would naturally suggest, and very coolly observed that "he would chance it."

Vaughan, J., in giving his judgment, says: "In this case I think the jury would not have found for the plaintiff, unless they had been satisfied that the defendant had been guilty of *gross negligence*;" a conclusion to which all the evidence directly pointed.

Now the *ratio decidendi* upon which this case proceeded is, as it appears to me, that the erecting the hay-rick where it was erected, in the damp and green condition in which the hay, to the knowledge of defendant, was, and in opposition to the warnings given to him as to the danger likely to ensue, constituted such *gross negligence* as to be *equivalent* to the defendant having *intentionally set fire* to the hay-rick with a lighted match; and that therefore upon the principle established in *Tubervil v. Stamp*, he was liable.

This, therefore, cannot, I submit, with propriety be referred to as being at variance with Sir William Blackstone's opinion, that the protection of the Statute extends to the case of fires having their origin in negligence.

Lord Lyndhurst, in the above case, commenting on *Vaughan v. Menlove*, 4 Scott 244, proceeds to say, at page 320: "One of the Judges (Bosanquet, J.) stated that the course which a reasonably prudent and careful man would adopt is the criterion in the case of a fire kept in the *house*. The same principle, he observed, must govern the case then before the Court. It seems, therefore, to have been the opinion of the learned Judge that the master of a house would be responsible where the fire was occasioned by his negligence."

It is difficult to understand how the reporter could have fallen into the error which, in this part of the report, he certainly would seem to have fallen into; for, in the first place, Mr. Justice Bosanquet did not sit on the case at all, nor did any of the learned Judges who did give judgment in the case, either as reported in 4 Scott 244, or in 3 Bing. N. C. 468, draw the analogy referred to by the Lord Chancellor between the case then before the Court and a fire kept in a *house*.

True it is, that it is there said that upon the question of negligence the rule has always been to enquire whether the care has been taken which a prudent man in the given circumstances would take; and, in quoting *Tubervil v. Stamp*, 1 Salk. 13, which was before the Statute of Anne, the opinion of Turton, J., is referred to, who went upon the difference between fire in a house and fire in a field; but that was upon the point which had been raised—that the custom of the realm only extended to fire in a house or *curt lege*; but the Court was of opinion that fire in a man's field was as much his fire as fire in his house.

There is nothing in the judgments of any of the learned Judges who delivered judgment in *Vaughan v. Menlove*, from which it can fairly be collected or inferred to be their opinion that the Statute of Anne or of Geo. III. had no application in the case of a fire originating in negligence.

Lord Denman appears to have been the first Judge, and that in a case, *Filliter v. Phippard*, 11 Q. B. 347—which did not call for the expression of opinion, and indeed, so far as

I have been able to find, he is the only Judge, who has expressly stated his opinion to be that if the fire appear to originate in negligence, the application of the Acts of Anne and of Geo. III. is excluded.

The action in *Filliter v. Phippard* was for damage sustained by the plaintiff from a fire intentionally lighted by the defendant in his own adjoining close, and which, by the negligence and want of proper care and caution of the defendant and his servants, extended into the plaintiff's close.

The statute of 14 Geo. III ch. 78, sec. 86, was set up as a defence, and it was contended that it only had local application in the metropolitan district, and had not general application throughout the realm; and further, it was contended that the fire described in the declaration, having been *intentionally kindled*, was not *accidental* in its origin, and so that the Act of Geo. III. did not apply.

This latter point was sufficient to determine the question, and it was determined upon it, as I have drawn attention to already; but in the course of his judgment, after referring to the Acts of Anne and Geo. III., and determining that sec. 6 of the former, and sec. 86 of the latter were of general application, he adds, at page 355: "The question then is, upon the meaning and effect of the word 'accidentally,' here applied to fire. And here," he says, "a very singular doubt has arisen from the mode in which this enactment is discussed by Sir William Blackstone in his Commentaries. The passage is introduced by that learned writer incidentally, as an illustration of the principle upon which masters are held responsible for the acts of their servants." Then he quotes the Commentaries: "'Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service. But now the common law is altered by statute 6 Anne, ch. 31, which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servants' carelessness.'"

Lord Denman then proceeds : " This reason, by the way, is not stated in the Act of Parliament, and must be allowed to be very far from satisfactory; because the principle on which actions are maintainable is not the punishment of guilty persons, but compensation to innocent sufferers. Besides, making servants punishable for fires resulting from negligence is no exemption of masters from responsibility for the same fault; *for fires which accidentally begin, are not fires produced by negligence.*"

Now, with all submission, in this last sentence is involved a plain *petitio principii*; for it is the very point which was made by Lord Denman himself to be, when making those remarks, the point in debate.

He proceeds : " It would, therefore, appear that Blackstone had drawn a conclusion from the enactment cited, which it by no means sustains. Lord Lyndhurst, however, has in some degree sanctioned by his high authority the inference thus drawn by Blackstone, in the remarks by which he prefaced his decision against Lord Canterbury's petition of right. We must, however, observe that those remarks are wholly unnecessary for the decision to which he came, and indeed are stated rather as arguments with which the petitioner would have to contend, if his case had come to a hearing on the merits, than as expressing a deliberate opinion. It is true," he adds, " that, in strictness the word *accidental* may be employed in contradistinction to *wilful*, and so the same fire might both begin accidentally and be the result of negligence. But it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and so would stand opposed to the negligence of either servants or masters. And, when we find it used in statutes which do not speak of wilful fires, but make an important provision with respect to such as are accidental, and consider how great a change in the law would be effected, and how great encouragement would be given to that carelessness of which masters may be guilty as well as servants, we must say that we think that the plaintiff's construction much the more reasonable of the two,

Lord Lyndhurst remarked on the absence of decisions on this point. Yet he mentions two cases, both surely entitled to great weight, one tried before Alderson, J., in Berks, and the other before Patteson, J., in Salop, which latter, (*Vaughan v. Menlove*, 4 Scott 244), was very fully discussed on a rule to shew cause, and decided by the whole Court of Common Pleas. In both these cases a plaintiff recovered damages for a fire spreading to his corn from the defendant's field through the negligence of the defendant and his servants. His Lordship says that Stat. 14 Geo. III, ch. 78, escaped notice on those occasions. But, if we ask how it came to be overlooked, since it would have furnished a complete and easy defence, the only answer can be, the universal impression of the eminent lawyers, both at the bar and on the bench, who took part in the argument and judgment, that the clause in the Building Act respecting accidental fires cannot apply to such as are produced by negligence."

Now, it is singular, that while expressing his surprise at Lord Lyndhurst having made remarks in Lord Canterbury's case, which Lord Denman pronounces to have been wholly unnecessary for the decision to which Lord Lyndhurst had come, Lord Denman himself should have fallen into the error which he condemns so freely, expressing his opinion, as above appears, upon a point wholly unnecessary for the decision of the case then before him; and that he has done so will appear by the concluding sentence in his judgment, wherein he decides the case before him wholly irrespective of the opinion he had just expressed, and upon a wholly different principle. He says, at page 358: "It may be further observed, with reference to this doctrine, that the exemption given by this enactment cannot apply. Its words suppose the fire to begin *accidentally* on the estate of him from whose estate it spreads. *Now, this fire did not begin accidentally, but was knowingly lighted by the defendant himself.*"

I have already observed that for this very reason the statutes of Anne and of Geo. III., assuming their plain construction to be as held by Sir William Blackstone, would

not have furnished any defence to the case referred to as tried before Baron Alderson, which was also the case of a fire actually and intentionally lighted by the defendant; nor, as it appears to me, would the statutes, for the like reason, have furnished a defence in *Vaughan v. Menlove*, 4 Scott 244, 3 Bing. N. C. 468, which proceeded upon the principle that its peculiar circumstances made the act of the defendant there complained of equivalent to the defendant having actually and intentionally kindled the fire which did the damage.

It is very singular, also, and worthy of remark, if the universal impression of eminent lawyers was that the statutes of Anne and of Geo. III., respecting accidental fires, could not apply to such as are produced by negligence, that not only as had been observed by Lord Lyndhurst in Lord Canterbury's case, no trace up to his time could be found in the books, since the passing of 6 Anne, ch. 31, of an action having been brought to recover compensation for injury, in despite of these Acts, upon the ground of negligence; but that in the only case in England in which the point was subsequently expressly raised, namely, *Filliter v. Phippard*, 11 Q. B. 347, the learned counsel, whose interest it was to assert that position, scarcely urged it, contenting himself with merely stating Sir William Blackstone's opinion, and referring to the case of *Vaughan v. Menlove*, and to Lord Lyndhurst's observation, that the statute had not been there cited, in a manner that conveys the impression that he concurred himself in Sir William Blackstone's opinion; and that he should have labored as he did in the contention that the statutes were only of local application, and so inapplicable to the case in argument; and that they were inapplicable for the other reason, namely, that the fire was *intentional*, and not *accidental*.

If the Act does not apply to such fires as are produced by negligence, then it may with safety, I think, be said that it will be inapplicable in ninety-nine out of every one hundred cases of fire; and it will follow, that if the proprietor of a house in which a fire originates, causes the fire by negligence, either by putting ashes before they are quite cold

into a barrel, which in course of time ignites, or by carelessly leaving a candle by mistake in a cellar where are stored spirits and other *inflammable* materials which ignite, or when reading in bed, by falling asleep, leaving a lighted candle by the bed-side, which sets fire to the bed-clothes; or by any one of an hundred other similar and frequent causes of the origin of fire; and that the fire spreads and does damage to his neighbour, he will be responsible for all the consequences, although the fire should be as destructive as that which a few years ago desolated the city of Chicago. To the utmost extent of his fortune he will be liable, and certain ruin will be his portion. Such a result would, in my judgment, be at variance with the common sense and the universal impression of mankind, an impression which may be said to have grown up in consistency with the practice of the Courts during more than a century and-a-half, during which period no case can be found wherein such a claim has been asserted.

Then there is the case of *Gaston v. Wald*, in our own Court of Queen's Bench, 19 U. C. R. 586, where in that Court, the late Chief Justice Robinson delivering the judgment of the Court, with all the above cases before them, came to the deliberate conclusion that they could not give to the words used in 14 Geo. III., ch. 78, sec. 86, in "whose house' dwelling, building, &c., any fire shall *accidentally begin*," so limited an application as to refuse to call any fire accidental, which arises from a want of due caution, and so hold it to be out of the scope of that clause."

This decision, until reversed on appeal, I should feel disposed to adhere to, not only as a decision expressly upon the point, but as one which recommends itself to my judgment; and if this case must of necessity turn upon that point, I should be of opinion that the rule should be made absolute to enter a nonsuit.

But there are several cases of actions against railway companies, similar to the present action, wherein the statute was never referred to at all; and one in which it was referred to, and the plaintiff, notwithstanding, was held

entitled to recover ; so that we must enquire whether, upon some other principle than the mere fact that the fire originated in negligence, the application of the statute is excluded.

By the common law, where a person, for his own private purposes, brings upon his premises an engine of an extremely dangerous and unruly character, such as a locomotive steam engine, worked by the dangerous element of fire, which, if it should escape from the fire-box in which, for the working of the engine, it is contained, is calculated to do mischief, he must keep that fire confined at his peril ; and if he does not do so, he will be answerable for all damage which is the natural consequence of its escape, irrespective of negligence, unless he can excuse himself by shewing either that the escape was owing to the plaintiff's default, or was the consequence of a *vis major*, or the act of God : *Rylands v. Fletcher*, in the House of Lords, L. R. 3 H. L. 330. But when the Legislature authorizes the use and employment of locomotive steam engines as a motive power, and consequently authorizes the dangerous element of fire to be carried along the railway for impelling the locomotives, the common law is qualified, but conditionally only upon the persons so authorized to use the fire taking all reasonable precautions, not only to prevent the escape of the fire, but to prevent combustible material collecting upon their property, and coming in contact with burning particles, hot coals, and ashes which cannot be prevented from escaping ; in fact, conditional upon their adopting all such precautions as may reasonably prevent damage to the property of third persons through or near which the railway passes : *Piggott v. Eastern Counties R. W. Co.*, 3 C. B. 229 ; *Rex v. Pease*, 4 B. & Ad. 30 ; *Vaughan v. Taff Vale R. W. Co.*, in the Exchequer Chamber, 5 H. & N. 679 ; *Jones v. Festiniog, &c., R. W. Co.*, L. R. 3 Q. B. 737.

In these actions, therefore, against railway companies, the enquiry always is, have they complied with the condition, subject to which alone the use of the fire, in the manner in which it is used is authorized, and by compliance with which they can alone relieve themselves from liability ?

This, as I understand the observations of Bramwell, B., is the foundation of his opinion in *Vaughan v. Taff Vale R. W. Co.*, 3 H. & N. 743, wherein he says, at page 752 : “ We are of opinion that the statute does not apply where the fire originates in the use of a dangerous instrument, *knowingly* used by the owner of the land in which the fire breaks out.”

The *original* fire, as it appears to me, is that which the defendants knowingly introduce upon their premises in the fire-box of the locomotive, and which spreads by particles escaping, and coming in contact with combustible material in proximity. That fire was *intentionally* brought into dangerous proximity with the combustible material, and, by extension, damages the plaintiff. The bringing the fire into such proximity, without taking all proper precaution to prevent the fire escaping and spreading, is a *wilful* and a wrongful act.

So that the principle which governs these cases is the same as governs the case of a fire lighted by a man in his field to burn rubbish ; and it is upon the same principle that the statute cannot apply.

The original fire having been *intentional* and wrongfully and *wilfully* brought in dangerous proximity with the property injured, the defendants shall not be excused, where from such conduct damage ensues to a neighbouring proprietor.

This, as it appears to me, distinguishes these cases from that of *Gaston v. Wald*, 19 U. C. R. 586, where the fire became lighted by the too great proximity of wood to a stove, which, as to the fire which was within it, was used in its ordinary and natural way for customary and necessary domestic purposes, and so as to create no apprehension of escape of fire, nor of any danger whatsoever, and from which, in fact, the fire had not escaped and spread.

It would be a straining of common sense to hold that a fire, spreading from fire carried about in the dangerous manner necessary for the use and propulsion of a locomotive steam engine, could, in the fourteenth year of George

III., have been in the contemplation of the Legislature as a fire *accidentally begun*, or could indeed have been in their contemplation at all. It seems more reasonable, therefore, to hold such a fire to be analogous to one *lighted* in a field to burn rubbish; that is to say, as *intentionally begun*, and not *accidentally*.

Upon the finding of the jury in this case we must take it to be concluded that the defendants did use all proper precautions to prevent the escape of fire from the locomotive, for a verdict is rendered in their favour upon the first count.

The negligence imputed, and which has been found against them by the jury, is the keeping the strip of land of the defendants lying between the track and the plaintiff's premises in an unreasonably unsafe condition; whereby, as is said, the injury complained of arose.

Now, the question of negligence is one which must always have relation to, and depend upon, the particular circumstances of each case.

In this case the circumstances to be considered are, that the railway had only recently been made through the forest, about three years only having elapsed since the first tree was cut down, and one year only since the railway had been opened; and that the plaintiff's own close, immediately contiguous to the railway fence, was still the natural forest; and the question is, was the track and strip of land adjoining, having regard to these circumstances, in an unreasonably unsafe condition. Was the apprehension that danger from fire would arise by reason of the condition of the defendants' property so natural as to make it necessary and proper for the defendants to have anticipated it, and to have removed whatever has been the cause of the fire spreading?

The plaintiff himself speaks of their being 180 stumps standing within the distance of 100 rods, as evidence of the improper condition of the strip of land of the defendants adjoining the track. Another witness speaks of the wild grass growing in places where there was not gravel;

another, of chips lying about, and of there being a log heap not yet burned when the trial took place, a year after the fire complained of, and which, at the time of the fire, was said to have been within 20 feet of a log which did take fire. Lastly, a log, six feet long, lying with one end within one foot of the fence, and the other end towards the railway ditch, which would naturally be some distance from the centre track, along which the fire was being conveyed in the fire-box of the locomotive.

Now, as to such wild grass as would grow in the midst of the stumps in the second year after the forest was cleared, was it natural to anticipate danger of its taking fire, and of the fire spreading thereby, so as to make it negligence in defendants not to remove it?

In view of the difficulty which the Court had in determining what was done in *Smith v. London and South Western R. W. Co.*, L. R. 5 C. P. 98, and in 6 C. P. 14, to constitute negligence, I do not think that the suffering of such wild grass to grow did constitute negligence. Moreover, it does not appear to have caused or to have contributed to the extension of the fire into plaintiff's premises.

The stumps having been suffered to remain in the ground, cannot be held to have constituted negligence; nor yet, I think, the chips, which, no doubt, remained from the clearing of the forest, and which, lying scattered along the ground, are not likely to have increased the danger of fire spreading. Neither did they, so far as appears, contribute to the extension of the fire into the plaintiff's premises. So neither can it be said that there was negligence in leaving the log heap, which did not take fire at all, notwithstanding that the log within 20 feet of it was consumed.

The jury have found that the fire first took place in this log. Now, as to this, I confess the finding appears to me to be in direct contradiction to the evidence, which, I think, very clearly establishes that, if the fire took place first upon the defendants' premises at all, it took place in the fences, and extended from them inwards upon the defend-

ants' premises, and also upon those of the plaintiff. The maintaining of the fences could not constitute negligence; nor assuming the fire to have first taken in the log, do I think that the leaving this one log near the track, during the first year that the railway was opened, would constitute such negligence as would make the defendants responsible in this action.

We cannot shut our eyes to what every inhabitant of the country knows, that at the season of the year at which the fire complained of took place such fires are quite of common occurrence, and that indeed a year scarcely passes without similar fires taking place, and extending for miles equally in places remote from railways, as near them.

I confess I find it difficult to see anything upon the evidence in this case upon which this verdict can stand consistently with the administration of impartial justice. It seems to be based solely upon the principle that railway companies must pay, right or wrong.

I was under the impression that the defendants had not abandoned their objection taken at *Nisi Prius*—namely, that the evidence shewed the fire to have taken first in the fences, and that the maintaining the fences constituted no negligence; and assuming that point to be open to the defendants, I had formed the opinion that, consistently with the judgment of the Court, in *Smith v. London and South Western R. W. Co.*, there was no evidence here of negligence to go to the jury under the third count; but the Chief Justice, who tried the case, is of opinion that it is not open to the defendants to insist upon this point. If this be so, speaking for myself, to avoid the great injustice which maintaining this verdict upon the evidence given in this case would, as it appears to me, be, I am of opinion that we should, if the defendants desire it, in the exercise of our own discretion, send the case back for a new trial.

HAGARTY, C. J.—This case has been twice tried, and a verdict has been twice rendered for the plaintiff, on the ground that defendants kept their track in an unreasonably

dangerous state, by permitting the accumulation of combustible matter, &c., which took fire from sparks or hot cinders from their locomotives, and the fire spread into the plaintiff's adjoining land.

The only point presented for decision now is, whether defendants are protected by the Imperial Statute, 14 Geo. III. ch. 78, on the ground of the fire having accidentally arisen on their own land.

The point was raised for the first time on the argument of the rule for setting aside the first verdict, and this Court in giving judgment reviewed the authorities bearing on the question, but declined to let their decision rest thereon, as the point was not taken at the trial, nor formally raised on the motion, nor argued by the plaintiff's counsel; and the new trial was granted on other grounds. (a)

For a great number of years our Courts have from time to time had to consider actions brought for injuries sustained in consequence of fire, lighted for the purpose of clearing land, spreading from a man's land into his neighbours.

The law was much discussed in *Dean v. McCarty*, 2 U. C. R. 448, by the late Sir John Beverley Robinson, C. J.

The result seems to be that the question for consideration is, whether, assuming the burning of the logs in clearing forest land to be the ordinary course of cultivation in this country, the person so exercising his right has done so in a negligent manner, either in setting out the fire at a dangerous time,—*e. g.*, when a high wind was blowing towards his neighbour, in an extraordinary dry season—or in not watching the fire with reasonable care, &c.

The Chief Justice says, "In *Comyn's Dig.*, 5th ed., vol. 1, page 411, tit., Action on the case for Negligence, A 6, the law is thus laid down, 'So an action upon the case lies upon the general custom of the realm', (in other words by the common law), 'against the master of a house, if a fire be kindled there, and consume the goods or house of another

(a) See *Jaffrey v. Toronto, Grey and Bruce R. W. Co.*, 23. C. P. 553.

So if a fire be kindled in a yard or close, to burn stubble and by negligence it burns corn, &c., in an adjoining close.'

"As to the first part of what is said here applying to accidental fires in houses, we know that the law has by Act of Parliament been placed on a different footing: and that it has been thought reasonable to exempt persons from answering in damages for injuries occasioned to others in such cases, even where there may have been a want of due care. But as to the latter part of the doctrine laid down, but which applies to the case of a fire spreading, which has been kindled in a field to burn stubble, I do not find that the law is any where *denied* to be such as Chief Baron Comyn assumes it to be. It has not in this respect been altered by statute, nor does it seem to have been in any more modern authorities laid down differently; neither has it been made a question whether this principle thus laid down has been carefully considered and correctly stated. We see then that it is when by negligence the fire spreads to an adjoining close that an action lies."

In *Gaston v. Wald*, 19 U. C. R. 586, a fire in defendant's stall in a town market, spread from the stove to some wood found to have been negligently left too close to it, and spread into the plaintiff's cellar, which was beneath, injuring his goods.

The same learned Judge says: "We do not think we can give to the words used in the statute 14 Geo. III., ch. 78, sec. 86, in 'whose house, dwelling, building, &c., any fire shall accidentally begin,' so *limited* an application as to refuse to call any fire accidental which arises from a want of due caution, and so hold it to be out of the scope of that clause. * * It is true that the defendant or his servant, in this case, no doubt, lighted the fire in the stove designedly. There was no accident in that. The words 'accidentally begin' as used in the Act, are not to be applied in reason, we think, to the fire beginning in the stove, but in the combustion outside."

In *McCallum v. Grand Trunk R. W. Co.*, 31 U. C. R. 527, two of the Judges seem to consider that the Imperial sta-

tute might be a bar in a case like the present, but the case was decided on another ground.

The point was raised in a case now standing for judgment in appeal from the Queen's Bench *Gillson v. North Grey R. W. Co.*, but the case may probably be decided on other grounds (a).

It is, or was lately, also before the Queen's Bench in *Holmes v. Midland R. W. Co.* (b).

In England I have only seen the point expressly decided in *Filliter v. Phippard*, 11 Q. B. 347. A fire was knowingly lighted by the defendant in his close, and was charged to have been both lighted and kept in a negligent and improper manner. It was held that the statute gave no protection.

I gather from the pleadings and the judgment of Lord Denman that it was a fire intentionally kindled for defendant's purposes on his estate, not the mere case of a fire used for culinary or domestic purposes.

Lord Lyndhurst notices at some length the state of the authorities, without deciding the question, in *Viscount Canterbury v. Attorney-General*, 1 Phillips 306.

In *Vaughan v. Taff Vale R. W. Co.*, 3 H. & N. 743, Bramwell, B., says, "We are of opinion that the statute does not apply, where the fire originates in the use of a dangerous instrument knowingly used by the owner of the land in which the fire breaks out."

This case was reversed in error, 5 H. & N. 679, on another ground. There was no decision as to the statute.

In *Vaughan v. Menlove*, 3 Bing. N. C. 468, a recovery was had for damages caused by a fire spreading from the defendant's hay rick into the plaintiff's land, the fire being caused by spontaneous ignition in the rick, which was negligently kept and left by the defendant in a state liable to ignite.

The case was tried before Sir J. Patteson, and rested on the existence of negligence, and after argument in term,

(a) Since reported in 35 U. C. R. 475.

(b) Since reported in 35 U. C. R. 253.

judgments are delivered by Tindal, C. J., Park, and Vaughan, JJ., on the same question. The verdict was upheld, and the statute was not in any way noticed.

So in *Smith v. London and South Western R.W.Co.*, in Error, 6 C. P. 14, the defendants were held liable for damages caused to the plaintiff's land by a fire caused by sparks from the engine igniting a quantity of dry clippings from the hedges along the defendants' line of way, which in a dry season they had negligently allowed to lie there. It is hard to distinguish this from the case before us. Neither counsel nor judges seem to have noticed the statute.

I repeat that on this motion I must assume the defendants have been guilty of negligence, and the only point for judgment is, whether the statute is a protection.

I consider that the defendants after two verdicts against them on the question as to the state of their track, deliberately abandoned any further attempt to convince a jury, and rested their defence wholly on the point whether, even if to blame as to the state of the track, the Imperial Statute protected them.

It was solely on this the leave to move for a nonsuit was reserved at the last trial; and, as I understood it, it was solely on this the rule was asked for by Mr. Lash, and granted by my brother Galt and myself: my brother Gwynne being absent.

I would not have found for the plaintiff had I been on either jury; but I do not see anything in the case, to induce me to look at it now in an aspect in which the defendants' counsel, after his energetic defence, had, (as I understood him), admitted he would not ask us to regard it; and I think, therefore, that there should not be a new trial.

GALT, J., concurred with GWYNNE, J., that a new trial should be granted.

Rule absolute for new trial.

SMITH AND THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF OAKLAND.

By-law creating debt—Repeal of—36 Vic. ch. 48, sec. 254.

Where a by-law had been passed by a Municipal Corporation, creating a debt, and before the debt had been paid it was by a subsequent by-law repealed.

Held, that under 36 Vic. ch. 48, sec. 254, the repealing by-law was invalid and must be quashed.

IN Easter Term *M. C. Cameron*, Q.C., obtained a rule *nisi* to quash by-law No. 1, passed in the year 1874, on the ground that the said by-law repealed by-law No. 20, of the said Municipal Council, passed on 31st May, 1873, authorizing the borrowing by the Public School Trustees of section No. 4, of the said Township of Oakland of the sum of \$1,300, for the school purposes therein mentioned, and under which a portion of the sum had been borrowed, and a school-house built, and which was still unpaid for, and the repeal of the said by-law was beyond the power of the said Council, as it authorized the contraction of such debt, and such debt had been contracted.

By-law No. 1 was as follows :

“To repeal by-law No. 20, passed by the Municipal Corporation of the Township of Oakland, on 31st May, 1873.

“Whereas it is necessary and expedient to pass a by-law for the purpose aforesaid.

“Therefore it is enacted by The Municipal Corporation of the said Township of Oakland, now in Council assembled, as follows, that is to say : That by-law No. 20, passed by the Municipal Corporation of the said Township of Oakland, on the 31st May, 1873, be and the same is hereby repealed.

“Passed in Council this 26th day of January, 1874.”

It appeared that by-law No. 20 was a by-law to authorize the Public School Trustees of section No. 4, of the Township of Oakland, in the County of Brant, to borrow the sum of \$1,300, to be used and applied in the purchase of a site, enclosing the same, and erecting a school-

house thereon, and to provide for the repayment thereof with interest; and to repeal by-law No. 19.

From the affidavit of the relator, *William Smith*, filed on this application, which was not contradicted, it appeared that before by-law No. 1 was passed, the trustees of school section No. 4 had purchased a school site therefor, enclosed the same, and erected and completed thereon a large and commodious brick school-house at a total expense of \$1,800: that long before the passing of the by-law No. 1 for 1874, the building erected by the trustees of the school section No. 4, had been and still was occupied as and for the purpose of a Public School for section No. 4: that under and by virtue of the authority of the by-law No. 20, and before the repeal thereof by the by-law No. 1 for 1874, the trustees of school section No. 4 borrowed from one G. W. Howell the sum of \$300, which sum of \$300 was expended by the trustees of the school section No. 4 in the purchase of a school site, the fencing thereof, and in digging a well thereon.

The affidavit then proceeded to give in detail the particulars of other liabilities incurred on the faith of the by-law No. 20.

In the same term, *Robinson*, Q.C., shewed cause. The by-law No. 20 was properly repealed, as it was not a valid by-law creating a debt under the Municipal Act, 37 Vic. ch. 48, sec. 254, for it was not passed in accordance with the Act, not containing the necessary recitals: *Scott v. Corporation of Peterborough*, 19 U. C. R. 469; *Cross v. Corporation of Ottawa*, 23 U. C. R. 288; *Wright v. Corporation of Grey*, 12 C. P. 479. The by-law is also bad, as it was to spend moneys in a section which did not exist: *Hart and Corporation of Vespra and Sunnidale*, 16 U. C. R. 32. There is no doubt but that, except in the case of where debts have been incurred, the Municipality have power to repeal by-laws: *Great Western R. W. Co. and Corporation of Cayuga*, 23 C. P. 28. The repeal is in fact carrying out the decision of the Court of Queen's Bench in *Proper*

and *Corporation of Oakland*, 34 U. C. R. 266, where a similar by-law, No. 23, arising out of the same transaction was held illegal.

M. C. Cameron, Q.C. The by-law No. 20 being one for creating a debt, and debentures having been issued under it, under 37 Vic. ch. 48, sec. 254, it is not repealable so long as the debt remains unpaid. As to this case being governed by *Proper and Corporation of Oakland*, 34 U. C. R. 266, it cannot be assumed, on this application, that the Court of Queen's Bench would have held by-law No. 20 invalid.

GALT, J.—Sec. 254 of 36 Vic. ch. 48, enacts that after a debt has been contracted, the Council shall not, until the debt and interest have been paid, repeal the by-law under which the debt was contracted, or any by-law for paying the debt or interest thereon.

This section is very clear, and seems decisive against the present by-law No. 1, but it was argued on the part of the respondent that by-law No. 1 was in truth only giving effect to a judgment of the Court of Queen's Bench, in the case of *Proper and Corporation of Oakland*, 34 U. C. R. 266.

We are unable to adopt this view. It appears that debts have been contracted on the faith of by-law No. 20, and if such by-law is illegal, steps should have been taken to quash it; but to allow the Corporation to proceed in the manner which they have done would be to constitute themselves judges in their own case.

As respects the case referred to, it had no reference to this by-law, but to by-law No. 23.

We were informed by Mr. Robinson that both by-laws arose out of the same transaction, but it may very well be that one may be set aside, and yet that circumstances may have occurred with respect to the other, which would prevent the Court from adopting the same course.

GWYNNE, J.—My view is this—that, inasmuch as by-law
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No. 1 professes to repeal another by-law passed by the same Municipality, which latter was one for creating a debt, and under which persons claiming to be creditors have become interested, which by-law the law declares shall not be repealed while the debt incurred thereunder is unpaid, we ought not to listen to the suggestion that the repealed by-law, in virtue of which persons were induced to advance their money, was void.

In such a case I think the validity of the by-law should be contested in a question between the parties, not argued, as here, in their absence; and that, in protection of those interests, we should quash a by-law which repeals another, which, on the face of it, authorizes the incurring of a debt which has been incurred.

HAGARTY, C. J., concurred.

;

Rule absolute.

On the 5th of September, 1874, the following rule was read and promulgated in open Court :—

“IN THE COURT OF QUEEN’S BENCH, AND THE COURT OF
COMMON PLEAS.

Regulæ Generales.

TRINITY TERM, 38TH VICTORIÆ.

Saturday, the fifth day of September, A.D., 1874.

IT IS ORDERED,—That the following Rules shall come and be in force in the Courts of Queen’s Bench and Common Pleas, from and after the last day of this present Trinity Term :—

1. As the business to be transacted out of Term does not appear to require more than one Judge of the Courts of Common Law to sit in open Court every week,—It is ordered, that one of the Judges of the Superior Courts of Common Law shall sit in open Court in Osgoode Hall, out of Term, pursuant to the Administration of Justice Act of 1874, every week, for the purpose of disposing of all Court business which may be transacted by a single Judge, and such sittings shall be on Tuesday and Friday of each week, and on such other days as the Judge holding such sittings may direct.

2. All Rules, directed to be issued out of Term, shall be four day Rules, and shall be heard at the first sitting of the Judge in open Court for arguments after the same are returnable, unless otherwise ordered.

3. Demurrers shall be set down at least four days before the day on which they are to be heard, and notice given to the opposite party.

4. A Demurrer Book shall be left with the Clerk of the Crown and Pleas, of the Court in which the cause is pending, at the time of setting down the demurrer.

(Signed) WM. B. RICHARDS, C.J.

“ JOHN H. HAGARTY, C.J.C.P.

“ JOS. C. MORRISON, J.

“ ADAM WILSON, J.

“ JOHN W. GWYNNE, J.

“ THOMAS GALT, J.

MEMORANDA.

During this term the following gentlemen were called to the Bar:—

ANGUS M. MACDONALD, FREDERICK ST. JOHN, JOHN ROSS, DONALD GREENFIELD MACDONELL, DAVID HILL WATT, JAMES PARKES, THOMAS B. BROWNING, JOHN RICE MCLAURIN, JOHN WRIGHT.

IN THE COURT OF ERROR AND APPEAL.

HALL (Plaintiff in the Court below) *Appellant* v. HAMILTON
(Defendant in the Court below) *Respondent*.

*New trial on a matter of discretion—Right to appeal—Costs—C. S. U. C.
ch. 13, secs. 10, 26.*

Under C. S. U. C. ch. 13, sec. 26, there is no appeal to the Court of Error and Appeal, where a new trial is granted in the Court below on a matter of discretion only; and an appeal in such case was, under sec. 10, quashed with costs.

Appeal from the Court of Common Pleas (a).

The defendant was sued as the maker of two promissory notes, payable to one A. Boyden or bearer.

The defence was want of consideration and fraud upon the defendant by Boyden, one Pike, and others, in inducing the defendant to make the notes, and notice thereof to the plaintiff.

This was a Superior Court case tried before George Duggan, Esquire, the Judge of the County Court of the County of York, without a jury, at Toronto, at the Fall sittings for 1873 of the County Court of the County of York.

The defendant was examined as a witness on his own behalf, and stated that he was a member of the firm of Hamilton & Martin, and that his firm were making pumps for a firm of Pike & Dixon: that they represented to him that they had bought from one A. Boyden a certain patent right, (for what invention or discovery was not proved or shewn), for which they were to pay \$1,200, and that Boyden would not take their notes: that he (defendant)

(a) Argued June 29th, 1874, before DRAPER, C. J., of Appeal, STRONG, J., BURTON, J., PATTERSON, J.

agreed to purchase a half interest in the patent for seven counties; and "the making of tongue supporters" for nineteen counties, for which he gave them three notes, payable to Boyden or bearer, each for \$200, viz: the two notes sued upon in this action and a third on which Pike brought an action against him, but did not prosecute it. The same day on which these notes were given, Boyden offered him these notes for \$350. The defendant told Pike of this, who advised him to buy them, and then defendant suspected that there was something wrong. Then one Patrick Hyland came to him about these notes, and defendant told him to have nothing to do with them, that it was a swindle. Boyden had a patent which he was to give to defendant, and Pike and he did sign over a patent to them which defendant got recorded in Ottawa.

In rebuttal the plaintiff swore that he paid Pike \$500 for the three notes, and got them from him without any notice of a fraud connected with them, or of the circumstances under which they were given; and that he never knew or saw Boyden. He was cross-examined at length, and he and defendant differed upon several particulars.

The learned Judge entered a verdict for the plaintiff with \$417.11 damages.

In Hilary Term, 1873, *Harrison*, Q. C., obtained a rule *nisi* to set aside the verdict entered for the plaintiff, and for a new trial, or to enter a verdict for the defendant under the Law Reform Act, upon the grounds that the verdict was contrary to law, evidence, and the weight of evidence, and the learned Judge should have rendered a verdict for the defendant.

In Easter Term *M. C. Cameron*, Q. C., shewed cause, and *Harrison*, Q. C., supported the rule.

The Court of Common Pleas made the rule absolute for a new trial on payment of costs.

From this judgment the plaintiff appealed.

M. C. Cameron, Q. C., for the appellant. The only defence set up was want of consideration and fraud, but the

plaintiff disproved this, and the learned Judge, who tried the cause without a jury, found for the plaintiff. There clearly should have not been a new trial. It is objected, however, that by Consol. Stat. U. C. ch. 13, sec. 26, there is no appeal, as the new trial was granted as a matter of discretion, but this only applies when there is something before the Court upon which a discretion may be exercised, as, for instance, the discovery of fresh evidence. The case was tried before a Judge alone, and all the evidence was before the Court necessary to decide the case, and under 32 Vic. ch. 6, sec. 18, and 33 Vic. ch. 7, sec. 6, the necessity for a new trial is done away with, as the Court may pronounce the verdict which the Judge should have pronounced, and, therefore, if the evidence did not sustain the verdict, the judgment should have been for the defendant, but a new trial should not have been granted, for there was no suggestion of the discovery of fresh evidence.

F. Osler for the respondent. There can be no question but that the Court exercised a proper discretion in granting the new trial, as the evidence was most unsatisfactory, and having granted the new trial as a matter of discretion under Consol. Stat. U. C. ch. 13, sec. 26, there is no appeal: *Clark v. Hurlburt*, 6 C. P. 438; *Harris v. Robinson*, 25 U. C. R. 247; *Manning v. Ashall*, 23 U. C. R. 302; *McKinstry v. Furby*, 24 U. C. R. 176; *Barstow v. Reynolds*, 2 Jur. N. S. 790. As to the power now given to the Court to enter the verdict which the Judge should have entered, this does not take away the discretionary power to grant new trials.

September 8th, 1874. DRAPER, C. J. of Appeal (a).—It is objected by the respondent that, under the circumstances of this case, no appeal lies.

We have only before us the fact that the Court granted a new trial on payment of costs, without any report of the reasons or grounds of the decision.

(a) *Present*.—DRAPER, C. J. of Appeal, STRONG, J., BURTON, J., PATTERSON, J.

The rule *nisi* was granted upon the grounds that the verdict is contrary to law, evidence, and the weight of evidence, and that rule asks either for a new trial, or that the verdict be rendered for the defendant, pursuant to the Law Reform Amendment Act.

If the new trial is granted on the ground that the verdict is against the weight of evidence, then it rests, as appears to me, on "matter of discretion only," there being evidence on each side. It is not that the verdict was on the whole evidence certainly wrong, and therefore contrary to law, but that the evidence was not in the judgment of the Court so conclusively in favour of the plaintiff as to leave no doubt that he ought to recover.

And if the rule is grounded on the verdict being contrary to evidence, on a question of fact as distinct from the law applicable to facts established by the evidence, it is also an exercise of the discretion of the Court when they were of opinion that the evidence was not sufficient to warrant them in ordering a verdict to be entered for the defendant.

The Statute, Consol. Stat. U. C. ch. 13, sec. 26, expressly enacts that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict is against the weight of evidence or otherwise, no appeal shall be allowed.

We cannot dismiss this appeal with costs; but the 10th section of the Appeal Act, Consol. Stat. U. C. ch. 13, gives this Court power to quash the proceedings in any case in which Error and Appeal does not lie.

We, therefore, quash this appeal, and with costs, as we thus have jurisdiction to dispose of it.

STRONG, J.—The right to appeal from an order granting or refusing a new trial depends entirely on the Consol. Stat. U. C. ch. 13, sec. 24, which, as amended by 34 Vic. ch. 11, sec. 1, is in these words: "In all cases of motion for a new trial, upon the ground that the Judge has not ruled according to law, if the rule to shew cause be refused, or if granted be afterwards discharged or made absolute, the party decided against may appeal."

This enactment corresponds exactly with sec. 35 of the English Common Law Procedure Act of 1854, with the exception that the amendment referred to has stricken out the condition still to be found in the English Act, that one Judge has dissented, or that the appeal has been allowed by the Court below.

Without the aid of authority, I should have thought it plain, on the express words of the section quoted, that an appellant, in such a case as the present, to bring himself within the statute, must shew that the decision of the Court below, which he complains of, proceeded on some point of law; and that no appeal could be entertained where a new trial had been granted as being against the weight of evidence, or in the discretion of the Court, in order that the facts might be more fully investigated.

The authorities, however, leave no doubt on this point.

In *Barstow v. Reynolds*, 2 Jur. N. S. 790, there was a verdict for the plaintiff, and leave was reserved to move to enter a nonsuit, and a motion was made accordingly; but the Court, "in order that the facts might be more clearly ascertained," made the rule absolute for a new trial. There was a rule for leave to appeal, and a motion was made to discharge it. Pollock, C. B., said: "It is hardly worth while to discuss the point raised in this case, for it is of no practical importance at present. Independently altogether of the clauses of the statute in question, I maintain that the Court has a right and discretion, whenever it sees that justice has not been done at a trial, to grant a new trial in order that it may be done, and that from that decision of the Court there is no appeal. * * In the present case we think the matter has not been properly investigated, and, consequently, there ought to be a new trial;" and leave to appeal was refused.

In *Holden v. Mordach*, 27 L. J. Ex. 27, a new trial having been refused, and an application being made for leave to appeal, Bramwell, B., said, at p 28, leave to appeal should not be allowed, "unless it is on a question of law." And again, the same Judge said, at page 29: "The point

appears to have turned upon a question of fact involved in the verdict, as to which we have decided that it was not against the weight of evidence. We cannot grant an appeal except on a question of law."

In *Abbott v. Feary*, 6 H. & N. 113, in the Exchequer Chamber, Crompton, J., says, at page 117: "In this Court we are confined to matters of law."

Then, does the appellant in the present case complain of any decision of the Court below on a question of law? It appears to me that no matter of law could possibly have arisen, and that we must attribute the granting of the new trial to the desire of the Court of Common Pleas to have the facts more thoroughly examined, an exercise of the discretion of that Court which, as the cases cited shew, cannot be called in question here.

A strong presumption that the rule did not proceed on any question of law arises, too, from the consideration that a new trial would not have been necessary to set right any erroneous ruling in that respect, which may have occurred at the trial; for the cause having been tried without a jury, the Court of Common Pleas could, under the Stat. 33 Vic. ch. 7, sec. 6, have rectified any such miscarriage without sending the cause down to another trial.

I am of opinion that this Court has no jurisdiction to entertain this appeal, and that it ought to be quashed, pursuant to sec. 10 of Consol. Stat. U. C., ch. 13, with costs.

In *Abbott v. Feary*, it was held the Court could not give costs, but the English Act has no section corresponding to that just referred to, enabling the Court to quash the appeal for want of jurisdiction.

PATTERSON, J.—This cause was tried without a jury, and a verdict rendered for the plaintiff for \$417.11.

The defendant obtained a rule *nisi* for a new trial, or to enter a verdict for the defendant, pursuant to the Law Reform Amendment Act; and the rule was made absolute for a new trial on payment of costs.

Against this judgment the plaintiff appeals, contending

that the verdict for the plaintiff is sustained by the evidence, and that there is no material, such as the discovery of fresh evidence, brought before the Court, to warrant a new trial.

The defendant contests the plaintiff's right to appeal.

The Law Reform Amendment Act, 33 Vic. ch. 7, sec. 6, which gives power to the Court to pronounce the verdict which, in their judgment, the Judge who tried the cause ought to have pronounced, does not restrict the power which the Court already possessed in the matter of granting new trials.

The Court has an inherent power to grant a new trial, whether asked in the rule or whether the rule be merely to enter a verdict on leave reserved, or under the Act just quoted: *Abbott v. Feary*, 6 H. & N. 113.

The new trial in this case is granted, as it was in *Abbott v. Feary*, "upon matter of discretion only," and therefore by our Appeal Act, Consol. Stat. U. C., ch. 13, secs. 26 and 30, as by the equivalent provision in the English Common Law Procedure Act, 1854, sec. 35, no appeal will lie.

If our Appeal Act merely followed the English C. L. P. Act, 1854, we should probably have to hold that the case not being appealable, we had no jurisdiction, and could only so declare, without having power to award costs. But sec. 10 gives the Court power to quash proceedings in cases brought before it in which error or appeal does not lie.

We should, therefore, quash the proceedings in appeal in this case with costs.

BURTON, J., concurred.

Appeal quashed with costs.

HAMILTON ET AL. (Plaintiffs in the Court below) *Appellants*,
v. MYLES (Defendant in the Court below) *Respondent*.

Work and labor—Special contract not performed—Acceptance—Right to recover on common counts.

The plaintiffs agreed to put up three hoists, to raise and lower goods, in four wholesale warehouses which defendant was building. The specifications required them to be "capable of raising a weight of 2000 lbs. without risk," and the plaintiffs' offer, which defendant accepted, was to make them according to the plans and specifications, and to the satisfaction of defendant's architects, the same as in certain other warehouses named. They were put in in June, and the defendant's tenants went in in the same month. On the 31st August defendant's architects wrote to the plaintiffs requiring them to remove them and put in others, and the plaintiffs then made some improvements, which were completed in December. After the alterations were completed there was no evidence either of a refusal to accept or of any direct acceptance, and defendant denied that there was an acceptance, but the hoists remained in the warehouses and were used by the tenants until the 13th February, following, when the whole premises with everything in them were destroyed by fire. The defendant had left the country in January, and did not return until after the fire. The architect, who was called as a witness, said that he never had been satisfied with the hoists.

Held, reversing the decision of the Court below, STRONG, J., dissenting, that the user of the hoists by the defendant's tenants up to the time of the fire, formed evidence of acceptance, so as to entitle the plaintiffs to recover their value under the common counts. Per PATTERSON, J., the special contract was complied with so as to entitle the plaintiffs to recover.

Held, also that "capable of raising a weight of 2000 lbs. without risk," meant strength enough to lift and sustain such a weight during the lifting, and that defendant could not insist upon this being done with the application of any specified power. Per STRONG, J., that these words must be read in connection with the words, "to the satisfaction of defendant's architects," which latter words meant that the judgment of the architects was to take the place of any specification as to power. Per PATTERSON, J.—The satisfaction of the architects was to be with the performance of the contract as properly construed, and such satisfaction was a question of fact not necessarily to be shewn by an express declaration or certificate of the architects.

APPEAL from the judgment of the Court of Common Pleas, reported in 22 C. P. 298 (a).

The declaration contained the common counts, for money, goods sold and delivered, goods bargained and sold, &c.

Pleas: 1. Except as to \$175, never indebted. 2. Except as to \$175, payment. 3. Payment into Court of \$175.

(a) Argued, June 29, 1874, before DRAPER, C. J., of Appeal, STRONG, J. BURTON, J., PATTERSON, J.

It appeared at the trial that the defendant was erecting four warehouses, in each of which herequired certain iron-work, and a hoisting machine. His architects invited tenders, and on the 8th February, 1871, the plaintiffs addressed to them the following letter ;—

“Toronto, February 8th, 1871.”

“MESSRS. SMITH & GEMMELL, *Architects*.

“Gentlemen.—We hereby agree to make and complete in a good workmanlike manner, the following ironwork in the erection of four stores on Front Street, for Wm. Myles, according to plans and specifications furnished by yourselves; and to complete the same to your entire satisfaction, as follows:—

“Four cast iron fronts with columns in basement; eight window gratings; eight dados; twelve cast iron columns under rear wall; erected and complete, \$4,900.

“Four iron hoisting machines, with iron wheels, iron girders, iron chain, tested to five tons, double purchase and complete, in good working order, same as R. Lewis & Son, and John Torrance & Co., Church Street, \$1120; or four hoisting machines, complete and in good working order, with wooden rope wheel, and ropes, same as Frank Smith & Co., John Smith, Thomson & Burns, and others, \$175 each, or \$700.

“Heavy cast iron girder, wrought iron girder, bull’s eye grating for sidewalk in front of the building in its place \$574. Thirty-six casement columns, if required, \$412.”

The defendant accepted the tender for four hoisting machines with wooden rope wheels and ropes.

The specifications respecting the hoists were :—“Provide all the machinery, iron work, wood-work, and ropes required for an iron hoisting machine capable of raising a weight of 2000 lbs. without risk, one of which is to be erected in each store, and left in complete working order.”

The plaintiffs put in four hoists, one in each store.

William Hamilton, Jr., one of the plaintiffs, stated that after the work was done the defendant complained that the hoists would not lift 2000 lbs. with ease; and plaintiffs received the following letter, dated 31st August, 1871, from the defendant's architects: "We hereby give you notice to remove the hoists you have put into Mr. Myles's warehouses, and replace the same at once with hoists capable of raising 2000 lbs. with ease, as per contract and specifications. Mr. Myles will hold you responsible for any damage he may sustain through the defective hoists." It was found that the wheels were smaller than those referred to in the proposal, and they were taken out, and larger ones were put in of the proper size, and one hoist was made with a double purchase, for which defendant was to pay extra, and the hoists were then capable of hoisting 2000 lbs. without risk; and were exactly the same as Frank Smith's: that there were the same complaints afterwards; but what defendant complained of was that the hoists would not raise the 2000 lbs. as easily as he expected, not that they were not in accordance with the contract: that they were afterwards destroyed by fire.

The plaintiffs did not assert that the architects were perfectly satisfied with the work.

James Martin stated that he was the machinist employed in making the hoists and putting them up: that they were the same as those mentioned in the tender as regards size, but in Frank Smith's the wheel was iron: that he was afterwards present with defendant at one of the stores when the hoist was tested. The hoist was loaded with 1000 lbs. weight: that he tried to raise the 1000 lbs., and could just raise it off the floor: that the defendant complained that the hoists would not lift as easily as they ought to: this was before the alterations were made in the rope wheels: that he heard no more of the hoists until this suit; and that they were capable of raising more than 2000 lbs. without risk, and that five good men could do it; and that the architect never interfered with him.

A millwright, called for the plaintiffs, proved that he removed three five feet wooden wheels and put in three six feet wooden wheels at the request of the plaintiffs, and completed the alteration in December 1871, the defendant's tenants being in possession when these alterations were made.

James Smith, one of the defendant's architects, stated that before the alterations were made he examined the hoists, found that the wheels were smaller than those in Thomson & Burns's, Frank Smith's, and John Smith's: that after the alteration he did not examine them or hear of any complaint, and that he was not present when the hoist was tested to see if it would raise 2000 lbs.: that he saw one tested with four men, and that it would not raise 1000 lbs.: that he complained to plaintiffs about it, and sent them the letter of the 31st August, 1871: that this was before the wheels were changed: that his idea was that four men should be able to raise 2000 lbs. without risk: that he never was satisfied with the hoists, nor, so far as he knew, was his partner Gemmell: that the hoists were never satisfactory to him: that Gemmell died about Christmas, 1871, before the alterations were finished.

Thomas Blake stated that he was a machinist, and assisted Martin in making the hoists and putting them up: that they were the same as those in Thomson & Burns's, Frank Smith's, and John Smith's, except that they had wooden wheels instead of iron: that they were capable of raising 2000 lbs. without risk, by putting on four or five men, and were in good working order when he left them.

The defendant swore that the hoists were not according to the contract: that four men tried, and could not lift a weight of 1000 lbs., and the hoists were found entirely insufficient, and that, in Mr. Gemmell's presence, he told plaintiffs to take the hoists away, and that they could have been removed at pleasure: that he saw Mr. Smith the day after, and got him to write the letter above referred to: that plaintiffs then made some alterations in the wheels, but even then four men tried to and could not raise a weight of 2000 lbs.: that he repeatedly told the plaintiffs

to take away the hoists, and that if they had taken them away he would have put in others: that he told them as much as six or seven times between June and December, 1871; but he could not say he had done so after December: that he went away from Toronto, for his health, on the 2nd January, 1872, and went to the South: that all the four warehouses were afterwards destroyed by fire: that he refused to pay for the hoists because they were not good, and never accepted them, and the tenants had no authority to accept them, and up to the last day they complained. The fire took place on the 14th February, 1872.

John McBean stated that he had examined the hoists, and that they would not raise 2000 lbs. with ordinary power: that on the day of the trial he had examined the hoists in Frank Smith's and John Smith's, and that they would raise 2000 lbs. with four men quite easily, but the ones in defendant's would not do this.

A witness, named *Lavender*, was called by plaintiffs, who stated that certain alterations had been made to Frank Smith's and John Smith's hoists, before which they were just the same as those in defendant's warehouses.

The learned Judge, who tried the cause, asked the jury to say whether the defendant accepted the hoists. He told them that the hoists were to be made of the same description as those mentioned in the offer, and of a capacity to raise 2000 lbs.; that in his opinion capacity meant strength, and if these hoists were not capable of lifting 2000 lbs., but were of strength sufficient to sustain 2000 lbs.; "then the hoists under this contract should be of the same character."

The charge was objected to on two grounds, first, as to the construction of the word "capacity," and second, that there was no evidence to go to the jury of an acceptance by the defendant.

The jury found generally for the plaintiffs, not answering in terms the question as to the acceptance; nor did they express any conclusion as to the hoists being to the satisfaction of the architects, though their attention was drawn to it by the learned Judge.

Leave to move to enter a nonsuit was reserved on the two grounds, that the satisfaction of the architect was necessary to entitle the plaintiffs to recover, and that was not proved; and that there was no evidence from which the court could imply any other contract than the written contract.

The Court of Common Pleas made absolute a rule to enter a nonsuit, against which decision the plaintiffs appealed.

M. C. Cameron, Q. C., and *McMichael*, Q. C., for the appellants. According to the contract the machines were "to be capable of raising a weight of 2000lbs. without risk;" and to be the same as the ones named. It was shewn that when first put up they did not comply with the contract, the wheels being smaller, but new wheels were put in, and then they satisfied the contract. As to the capacity, nothing is said about the power, or the number of men required to raise them, but so long as they were of sufficient strength to sustain a weight of 2000lbs., and according to the pattern of those used by Thomson & Burns, &c., that was all that the contract called for. The plaintiffs however do not rely on the contract, but contend that they are entitled to recover under the common counts. The use by the tenants was such a taking possession of the hoists as amounted to a waiver of the terms of the original contract, and an acceptance and agreement to pay for them on a *quantum meruit*. It was assumed in the Court below that these hoists were fixtures, and so coming within the rule laid down in *Munro v. Butt*, 8 E. & B. 738; but they clearly are not fixtures, but chattels; and, as pointed out in that case, the acceptance of a chattel dispenses with the terms of the contract. If the defendant did not intend to accept them, he should have removed them, and not having done so but allowed his tenants to use them, he is bound by their act. The question of acceptance is a question of fact for the jury, and they have found that there was an acceptance.

Maclennan, Q. C., for the respondent. The appellants admit that the contract was not performed, and therefore the whole question is whether the appellants are entitled to

recover under the common counts. The hoists are clearly fixtures attached to and forming part of the realty, and therefore, as decided in *Munro v. Butt*, 8 E. & B. 738, and the other cases cited in the court below, the mere taking possession and user does not raise the inference of the defendant having dispensed with the conditions of the original contract, and of a contract to pay on a *quantum meruit*; at all events the user by the tenants does not amount to an user by the defendant. There could only be an acceptance under the contract, and there was clearly no such acceptance; as the appellants admit the contract was not performed. No doubt acceptance is a question of fact for the jury, but there must be some evidence to go to the jury, and there clearly is none here. It must also be taken into consideration that the user took place while the defendant was away in the South, and had no control over the tenants.

M. C. Cameron, Q. C., in reply. There was sufficient evidence to go to the jury of acceptance; and as to the defendant being in the South when the user took place, that of course is no answer, as by leaving the hoists there, knowing that they would have to be used by his tenants in the course of business, he impliedly agreed that they should use them.

September 8th, 1894.—*DRAPER*, C. J. of Appeal (a).—The written contract is made up out of the appellant's proposal, the respondent's acceptance of the second alternative contained in it, and the specifications furnished by the architects.

A question was raised upon the meaning of the word *capable*, used in the specification,—“capable of raising a weight of 2,000 pounds without risk.” The learned Judge at the trial having told the jury that capacity meant strength, the Court of Common Pleas seem to have concurred in thinking that this direction cannot be supported, and put this interpretation upon the contract, that the hoists should be

(a) *Present*—*DRAPER*, C. J. of Appeal, *STRONG*, J., *BURTON*, J., *PATTERSON*, J.

capable of raising a weight of 2,000 pounds : that is, capable of working in the ordinary way that hoists work *in warehouses* for the elevation of such a weight from one floor to another.

I confess that; if I rightly understand this interpretation, I am not altogether satisfied with it. I understand a hoist to be a machine, distinct from the power which puts it in motion, just as a thrashing machine is distinct from the horses that work it; and if these hoists were, with the application of any reasonable power, capable of lifting and sustaining, during the lifting, 2,000 pounds without risk, the contract would be fulfilled. Its "capacity," in that view, seems to me to mean strength enough to lift and raise 2,000 pounds when put in motion by some external force. The contract does not define this force. The architect says, his "idea was, that the hoist should be able to raise 2,000 pounds with four men without risk." But the specification does not express this idea. Two machinists, who were employed in making these hoists, swear that five men could raise 2,000 pounds with them without risk. It is, however, of no importance to pursue this any further, since the appellants, by changing the wheels first put in, admit that they had not in the first instance complied with the terms of the contract, according to their view of it, and the written disapprobation of the architect applies only to the hoists as at first put up. The plaintiffs then put in new wheels, and after this, one of the plaintiffs swears that the complaint made by the defendant was, that the hoists would not raise 2,000 pounds as easily as he (defendant) expected; and not that they were not in accordance with the contract. I understand this evidence relates to the hoists after the new wheels were put in, for the defendant's own testimony relates expressly to the state of things after he had been told in December that the hoists were all finished. He says four men ought to raise 2,000 pounds, and this was what he wanted, and that four men tried to raise 1,000 pounds, and could not; but Smith, the architect, who, as the defendant stated, was present on this particular occasion, says this was before the wheels were changed.

In my opinion the evidence shews that after the wheels were changed the complaint made, was that four men could not raise 2,000 pounds with the hoists; and I think this was then the only complaint. I cannot find this in the expressed terms of the contract. The architect, however, swears that he never "*approved*" of the hoist in the warehouse where the test of raising 1,000 was made, nor is there any proof that he was satisfied with any of them. If, however, the defendant accepted the hoists, it became indifferent whether the architect was satisfied or no, and this brings us to the question, whether there is evidence on which a jury might properly find that the defendant did at last accept the hoists.

On the first occasion the architects gave the plaintiffs notice to remove the hoists, and to "replace the same at once with hoists capable of raising 2,000 pounds with ease, as per contract and specifications. Mr. Myles will hold you responsible for any damage he may sustain through the defective hoists." Perhaps more may turn on the words, "same as Frank Smith & Co.," as including, though not expressing, "with the same power as Frank Smith & Co." This was not pressed on the argument, and I think those words relate to what immediately precedes, namely, "with wooden rope wheels and ropes;" the preceding part of the tender expressing "*with iron wheels, iron guides, iron chain.*"

However this may be, no such written disapproval was given by the architect on this occasion. The exact time at which the alterations were finished does not appear, but it was in December, 1871. The defendant's tenants used the hoists until the fire destroyed the warehouses with everything in them, on the 14th of February following. The defendant while certain that he told the plaintiffs to take away the hoists between June and December, cannot positively say whether he told him after December, by which I understand him to mean after the new wheels were put in, because he went away from the province on the 2nd of January, and did not return till after the fire. No refusal to accept after the alterations is shewn nor any direct acceptance; the defendant denies an acceptance, but the hoists remained in the warehouses, and the tenants continued to use them.

I think the defendant ought to have determined to reject them, if this was his intention, before he left the province, or, at the utmost, before the fire. A continuous user by himself, during an interval of (possibly) two months, would *per se* afford evidence from which acceptance might be presumed, and I think the user by the tenants should have the same effect under all the circumstances ; for I think it may be justly inferred that each hoist, or rather the use of it, was an element of computation of the rent to be paid for each warehouse, and I feel compelled to hold that they were proper to be considered by the jury on the question of acceptance, and from the manner in which the case went to the jury, I think they intended to find that the defendant had accepted.

It is no new doctrine that where a special contract remains unperformed, an action may be maintained for compensation, on the ground that the facts afford evidence of a new contract to pay for what has been done, or for materials furnished.

The case of *Munro v. Butt*, 8 E. & B. 738, appears to me quite distinguishable. Indeed the following language of Lord Campbell, at page 752, tends rather in favor of the plaintiffs :—" In the case of an independent chattel, a piece of furniture for example, to be made under a special contract, and some term, which in itself amounted to a condition precedent, being unperformed, if the party for whom it was to be made had yet accepted it, an action might, upon obvious grounds, be maintained, either upon the special contract with a dispensation of the condition alleged, or on an implied contract to pay for it according to its value."

The hoists in this case were independent chattels, capable of being removed without damage to the warehouses in which they were put up. The defendant cannot well dispute this, when his architects require the plaintiffs to remove the hoists first erected, and to replace them by others, and the defendant, in his evidence, says : " The hoists can be taken away at pleasure. * * If Mr. Hamilton had moved them away, I should have put in others ; I think I told him to take them away six or seven times."

The difference in *Munro v. Butt* is obvious. There the work sued for was done, (not in accordance with an existing contract), on defendant's own house, and it was held that his taking possession of his own house was no acceptance of work done upon that house, and incorporated with it. Here there was a continuous use of a chattel, which might be removed at any time.

I think, therefore, on the whole case, that the absence of any proof that the architect was satisfied is unimportant, because I am of opinion that there was evidence from which the jury might fairly infer a new contract, and an acceptance of the performance thereof by the defendant.

My conclusion is, that the appeal should be allowed, and that the plaintiffs should have judgment on their verdict.

STRONG, J.—I am of opinion that the plaintiffs' case entirely fails so far as it is founded on the special contract contained in their letter to Messrs Smith & Gemmell, dated the 8th of February, 1871.

They were bound by the express terms of that agreement to shew, as a condition precedent to their right to recover on it, that they had completed the work to the satisfaction of the architects; and of this, so far as I can find, there is no evidence.

The plaintiff, Wm. Hamilton, jun., indeed, in his evidence, disproves it; for he says, "I cannot say that Messrs. Smith and Gemmell were entirely satisfied with the work."

Mr. Smith, the architect, called by the plaintiffs, also says: "I did not examine them after the wheels were altered.
* * The hoists were never to my satisfaction or to that of my partner, so far as I know." And again: "The hoists were not satisfactory to me."

So that not only have the plaintiffs failed to establish that they are within the terms of the contract, but their own witnesses prove the contrary.

The law on this class of contracts, where work is to be done to the satisfaction of a third person, an architect or engineer, for instance, or only to be paid for on the certificate

of such third person, is well stated by Lord Chelmsford, in *Scott v. Corporation of Liverpool*, 3 DeG. & J. 334. The result being that where, as in the present case, work is to be performed or an article manufactured subject to the approval or certificate of a third party, the approval or certificate must either be obtained or shewn to be fraudulently withheld, in order to entitle the party performing the work or services to any right of action.

I do not agree that it is sufficient, where the requirement of the contract is, that the work shall be performed to the "satisfaction" of an architect, to shew that the work is reasonably sufficient: the parties have chosen to put themselves on the judgment of an arbiter, by whose decision they must abide.

But even were this otherwise, it could make no difference here; for even granting that the Court below were wrong in the construction which they put on the contract, as to the meaning of the word "capacity," and that the learned judge who tried the cause was right in his original view, something more than mere strength to lift 2,000 pounds was required before these hoists could be said to be reasonably sufficient, namely, that they should be capable of being worked by an application of motive power, which could be readily and conveniently obtained. It never could have been the intention of these parties that the plaintiffs should be considered as fulfilling their contract if they furnished hoists of a strength to sustain a weight of 2,000 pounds, but of such a construction as to require a steam engine with a power equal to that of four horses to raise it; and I think the evidence shews that the hoists supplied by the plaintiffs were not capable of being worked by a reasonable application of power.

But in my view, taking the word "capacity" to mean strength only, as Mr. Justice Galt first held, and in which construction I agree, there would have been a very important defect in the contract, as regards the protection of the defendant, if it were not that the provision requiring the work to be done to the architect's satisfaction was to be found in it.

This judgment of the architects, I take, was intended by the parties to stand in the place of any specification as to power, and I read the contract as though it had in express terms provided that the hoists were to be of sufficient strength to raise 2,000 pounds, with such power as the architects thought reasonable. To substitute the opinion of a jury for that of Messrs. Smith & Gemmell would be to force upon the defendant a contract he never entered into or intended to enter into.

The result is that, in my judgment, there was not the slightest evidence to be left to the jury of performance of the express contract.

Then arises the question principally dealt with in the judgment of the learned Chief Justice in the Court below—did the conduct of the defendant, in his mode of dealing with the hoists, after the alterations in December, afford evidence of acceptance sufficiently strong to be left to the jury under the *indebitatus* count for goods sold? In other words, there being no performance of the express contract, were the circumstances sufficient to warrant the judge in leaving it to the jury to imply a new contract?

Upon this part of the case I have felt much doubt. Had the facts been that the hoists having been altered and the wheels replaced in December, with the knowledge of the defendant, were afterwards, with his assent, used by his tenants until the fire on the 14th of February, without any dissatisfaction having been expressed by the defendant and communicated to the plaintiffs, I should have been inclined to think there was a case for the consideration of the jury. There would then, in my judgment, have been a state of things which, without amounting to direct proof, would have justified the jury in drawing the inference that the defendant had accepted these machines as altered. I find, however, from the evidence that the complaints of the insufficiency of the work did not come to an end when the alteration was completed in December, for one of the plaintiffs, Mr. Hamilton, jun., most distinctly states the contrary to have been the fact. He says: "There were the same complaints

afterwards," meaning after the wheels were changed in December.

The question, then, is reduced to this: Is the defendant to be concluded by the use which, with his sanction, his tenants made of the hoists in spite of his objection to accept them, expressed to the plaintiff? The acts and conduct of a party, which give rise to presumption of intention, are, I take it, always susceptible of explanation by the express declarations and protestations of the same party with reference to the subject matter, and these latter may be so clear and definite as entirely to neutralize what would otherwise be a just inference from the conduct unexplained.

I gather from the evidence that there was not, after December, merely one complaint, and after that a use of the hoists without any further expression of dissatisfaction, but that, on the contrary, the complaints were continued from time to time. This being so, I think it cannot be said that the mere use by the tenants of these machines, which totally failed to meet the requirements of the contract, and which were ill adapted for the purposes for which they were intended, and which, moreover, it was for the plaintiffs and not for the defendant to remove from the defendant's premises, accompanied, as it was, by the complaints mentioned, constitutes any evidence of a case against the defendant as having waived the special contract and purchased as on a *quantum meruit*. By the complaints, which were from time to time made, I consider the defendant as giving the plaintiffs to understand that he considered the machines to be still their chattels, and accompanied with such notice, the act of user became quite immaterial.

In my opinion there was no evidence proper to be left to the jury of the acceptance by the defendant of the chattels in question, and therefore I think the judgment of the Court of Common Pleas should be affirmed, and the appeal dismissed with costs.

BURTON, J.—The question upon this appeal is, whether there is any evidence upon which the jury might reasonably

have acted to support a recovery on a *quantum meruit*, it being conceded on the argument that the plaintiffs were not entitled to recover on the special contract.

My first impression was, that the case was not distinguishable from *Munro v. Butt*, 8 E. & B. 738, cited by Mr. Harrison, and relied upon by the Court below ; but after hearing the argument of counsel, and giving the matter further consideration, I have come to the conclusion that the cases are not parallel, and that there was evidence offered in this case which the Judge could not properly withhold from the jury, and upon which it was competent for them to return a verdict in favor of the plaintiffs for the value of the work done.

In the case relied on the work was of such a nature that it could not be rejected. The materials had been worked into the corpus of the defendant's own property and it was not in his power to return them, so that having no option in accepting them he was not necessarily liable for the value. As Lord Campbell remarked in delivering judgment, what was the owner of the house under such circumstances to do ? It might be very essential for him to occupy. Under such a state of facts it would have been contrary to all reason to construe the *mere possession* into a waiver of the conditions of the special contract or the creation of a new one ; but in the case of a portable article, one that can be removed without injury to the other work done upon the building, it is practicable for the defendant to repudiate and to throw the article back upon the hands of the manufacturers.

It was contended that the hoists which were the subject of the suit in this case might be considered as part of the realty. It is quite true that in some sense, and under certain circumstances they might have been so considered, but they could scarcely be regarded in that light as between these parties ; on the contrary we find the defendant treating them as chattels and directing their removal when disapproved by the architect in August, 1871. They were made under another and distinct contract from that under which the building was erected, and although an essential convenience to a warehouse, they were not incorporated with the other

work, but were readily removable without injury to the structure of the building.

No mere user of the house for any length of time would, in the case referred to, in itself have afforded any evidence, either of waiver or of a new implied contract. Something more was required, although as remarked by Lord Campbell, if the defendant there had used any language or done any act from which acquiescence on his part might have been reasonably inferred the case would have been different.

Here the defendant had the option to return the articles upon the hands of the manufacturers, as he had proposed to do before the alterations were made, and to supply them from another quarter, but he adopts a different course, and allows them to remain upon the premises, with the knowledge that they were in daily or hourly use by the tenants, and were liable to deterioration and injury. It was admitted by the learned counsel for the defendant that a continuous use by the tenants under such circumstances for a longer period, say for five or six months, would have raised a presumption of acceptance or waiver on his part. If that be so, *cadit quæstio*, as it seems to me; it is merely a question of degree, and taken in connection with the fact that on his first disapproval he had directed their removal in writing, whilst on the last occasion of their being tested he had contented himself with some expressions merely of dissatisfaction, not so much with the workmanship, or that they were not in accordance with the models of his own selection, but amounting rather to a feeling of disappointment that they had not come up to his expectations in working with the ease he had anticipated—I say taking these circumstances in connection with his subsequent action of leaving the country with the avowed intention of being absent for months, and with the knowledge that the hoists were in daily use by the tenants, and would be so used during his absence, he can scarcely complain if these facts are left to a jury as some evidence of his having withdrawn his objection, and agreed to accept them; and I entertain a very strong opinion that it would not have been proper to withhold them from the consideration of the jury,

that they were properly submitted to them, and that the appeal therefore should be allowed.

PATTERSON, J.—The rule *nisi* in this case asks for a nonsuit on the leave reserved, the grounds taken at the trial being that the work was not done to the satisfaction of the architects, and that there was no evidence from which the Court will imply any other contract than the written contract; and it asks, in the alternative, for a new trial, on the law and evidence, and for misdirection of the learned Judge who tried the cause in his construction of the words, “capable of raising a weight of 2,000 pounds without risk.”

The rule was made absolute for a nonsuit.

The plaintiffs appeal on the grounds that the nonsuit was improper, as there was evidence for the jury, and that there was no misdirection, and they contend the verdict should therefore stand.

The defendant states his reasons against the appeal, all of which are directed to the maintenance of the nonsuit. He does not ask to have the rule made absolute for a new trial in the event of a nonsuit being disallowed.

In the view I take of this case, it is immaterial whether this Court has power, under sec. 11 of the Act respecting the Court of Error and Appeal, to order a new trial on this appeal, or whether that branch of the rule should be disposed of, if necessary, by the Court below, as seems to have been considered proper in *Betts v. Menzies*, 1 E. & E. 990, as I am of opinion the verdict should stand, and the rule should be discharged.

The learned Judge who tried the cause left, as I understand from his notes, two questions to the jury, namely, whether the hoists were to the satisfaction of the architects, and whether the defendant ever accepted the hoists. The verdict being for \$500 only, while the contract price was \$700, probably indicates that the jury found on the latter branch of the charge.

The only question, on this motion for a nonsuit, is, was there evidence for the jury?

In my opinion there was evidence on both branches.

I think the verdict is clearly sustained by evidence, if given as *quantum valebat*; and that the evidence would have justified a verdict for \$700 on the basis of the contract.

My view of the contract agrees rather with that taken by the learned Judge at the trial, than with that in which he concurred in *banc*. No specification for the construction of the machines appears to have been prepared by the architects. They merely invite tenders for "the machinery, iron work, wood-work, and ropes required for an iron hoisting machine, capable of raising 2,000 pounds without risk, one of which is to be erected in each store and left in complete working order."

The plaintiffs head their tender as follows: "We hereby agree to make and complete in a good, workman-like manner the following *iron-work* in the erection of four stores on Front Street for William Myles, according to plans and specifications furnished by yourselves, and to complete the same to your entire satisfaction as follows:" Giving then their prices for iron columns, gratings, girders, &c., for which there must necessarily have been specifications; and offering to construct four iron hoisting machines, with iron wheels, iron guides, iron chain tested to five tons, double purchase, and complete, in good working order, same as R. Lewis & Son, and John Torrance & Co., for \$1,120; or four hoisting machines, complete and in good working order, with wooden rope-wheel and ropes, same as Frank Smith & Co., John Smith, Thomson & Burns, and others, for \$700. The absence of specifications for these machines is supplied by reference to existing machines as models; and the last named offer is accepted.

It appears that the hoists of Frank Smith & Co., &c., had iron rope-wheels, and not wooden ones.

The contract, therefore, as I understand it, was to make machines similar to those named, except that the rope-wheels were to be of wood. I am not satisfied that the 2,000 pounds capacity formed any element in the contract, either as an essential term or as a warranty. But, assuming it to have

done so, I think its import was correctly explained to the jury. I see no ground for adding to the words used by the parties, or for reading those words in any but their ordinary sense. I cannot read the words "*without risk*" as equivalent to the very indefinite expression "*with ease*," which Mr. Smith, the architect, substitutes for them in his letter of 31st August, 1871; or as meaning anything more than that, when the machine is used for raising a weight of 2,000 pounds, there must be no risk of danger to the persons employed about it, or of damage to the goods being raised, or to the machine itself. I cannot import a stipulation that the weight is to be raised by four men, or five men, or by any stated power.

The contract seems to me not unlike that in *Parson v. Sexton*, 4 C. B. 899, in which the defendant's foreman having seen an engine which the plaintiff had to sell, the plaintiff offered in writing to "provide a fourteen horse engine;" and the defendant agreed in writing to purchase "a certain fourteen horse engine, which our foreman has inspected." It was there held that the defendant had purchased the specific engine, and could not reject it because it was not of fourteen horse power; and that, assuming that there was a warranty as to its power, and that the warranty was broken, that was no answer to the action, although it might be used in reduction of the price, or made the subject matter of a cross action.

The cases of *Chanter v. Hopkins*, 4 M. & W. 399, and *Ollivant v. Bayley*, 5 Q. B. 288, shew that an order to make a machine of a specified kind is the same in principle as an order for a specific machine already made.

The evidence on the plaintiff's part of the capacity of these machines is principally that of the witnesses Martin and Blake. The former says: "The hoists were capable of raising more than 2,000 pounds without risk. Five good men would do it." And the latter says: "They were capable of raising 2,000 pounds without risk, by putting on four or five men."

It was distinctly shewn, and scarcely, if at all, contra-

dicted, that after the enlargement of the wheels in December, 1871, the machines were, with the difference of the wooden wheel, like the agreed models, as the latter were at the date of the contract and before any change had been made in them, such as the witness Lavender speaks of.

Mr. Maclellan referred to the defendant's evidence to shew that the machines had been left incomplete, because the holes in the floor had not been altered after the enlargement of the wheels. But I find nothing stated to shew that any alteration was necessary, or that it was any part of the plaintiffs' duty to adapt the building to the machines.

There would, therefore, have been no difficulty in finding on the evidence that the machines were constructed as agreed. Was there evidence that they were completed to the entire satisfaction of the architects? I think there was, and that the learned judge properly directed the jury that "the question of the architect's certificate need not engage their attention beyond saying whether the hoists were to the satisfaction of the architects."

The contract does not require from the architects a certificate in writing, or any certificate, to shew their satisfaction. All that is necessary is that they shall be satisfied. The contract will not be extended in this respect beyond its express provisions: *Roberts v. Watkins*, 14 C. B. N. S. 592. Neither is there any power given to the architects to construe the contract. They must be taken to read it according to its true legal construction; and we must treat it on the principle expressed by Sir Fitzroy Kelly in giving judgment in *Roberts v. Bury Commissioners*, L. R. 5 C. P. 310, at page 331: "We are not to assume a jurisdiction which we do not possess, to mitigate the hardship upon contractors of clauses, however oppressive, which are sometimes, and indeed most commonly, introduced into agreements of this nature; but we must take care also not to add to their severity, and to the injustice which they are often the means of inflicting upon a contractor, by imagining stipulations which are not to be found in the contract, and which parties have never entered into or contemplated."

These architects, Messrs. Smith & Gemmell, were to be satisfied, not that the hoists were such as, upon their erroneous reading of the contract, they thought they should be, but that they were such as the plaintiffs were bound to make. Whether they were so satisfied was a question of fact to be found by the jury from any proper evidence. In the absence of a stipulation requiring it, it cannot be insisted that the satisfaction can only be proved by an express certificate or formal statement.

Where such a certificate is stipulated for, its production is usually a condition precedent to the right of action. In such a case, although an architect, or other referee, might give his testimony at the trial that work was done to his satisfaction, and that he had always been satisfied with it, though he had not, before action, certified that he was satisfied; yet for want of such certificate the plaintiff would be nonsuited. Harsh as this rule seems, it is well established; but it will only be applied when parties have by the terms of their contract brought themselves within it.

If, in the present case, the agreement to do the work to the satisfaction of the architects includes an agreement that those gentlemen shall expressly say that they are satisfied, then such a declaration of satisfaction becomes a condition precedent, and the plaintiffs must shew, at the peril of a nonsuit, not only that the architects were satisfied, but that, before action, they had said so. To hold any such express declaration necessary would be importing into the contract a term which is not found there.

I understand from the reports of *Parkes v. Great Western R. W. Co.*, 6 Jur. 638; *Parson v. Sexton*, 4 C. B. 899, and *Grafton v. Eastern Counties R. W. Co.*, 8 Ex. 699, that in those cases the question of satisfaction was treated simply as a question of fact necessary to be shewn, but not necessarily proved in any particular way. I refer also to the judgment delivered by Crompton, J., in *Braunstein v. Accidental Death Insurance Co.*, 1 B. & S. 782.

We inquire, then, what was the evidence of this work being done to the satisfaction of Messrs. Smith & Gemmell

—bearing in mind that they were to be satisfied not with the machines, but with the performance of the contract as properly construed; just as in *Ripley v. Lordan*, 6 Jur. N. S. 1078, a machine was to be made to the approval of a Mr. Jeffries; and it was held that the approval was to be only of the workmanship, not of the machine as being fit for the purpose intended; and, as in *Parson v. Sexton*, the last instalment was not payable till the defendants were “satisfied with the work as per agreement;” and it was held that this stipulation referred to the work of the plaintiffs in erecting the engine, and not to the engine itself.

It is true that Mr. Smith says in his evidence that he never was satisfied with the hoists; and that, as far as he knew, his partner, Mr. Gemmell, never was. But Mr. Smith shews distinctly that his dissatisfaction was with the operation of the machines, what he calls their lifting power, and that he speaks with reference to his construction of the contract, that they should be capable of raising 2,000 pounds with the power of four men.

In one particular the machines, as at first made, were not like the model, viz., in the size of the rope-wheel. This was remedied some time in December. Whether the size of the wheel was ever made the subject of specific complaint, or only covered by the general complaints, which were ultimately expressed in the letter of 31st August, is not very clear; but all other complaints seem to have related to the want of power, not to defective construction or insufficient materials. Mr. Smith says, amongst other things, that he wrote the letter of the 31st August at the request of the defendant, because his tenants complained that the hoists would not do the work: that he did not examine the machines after the wheels were altered: that he heard no complaints after that; and that he found no fault with the workmanship.

Now, considering that the work was done under the eye of the architects; and that the only complaints were of something outside of the contract altogether, and that the dissatisfaction stated in evidence is entirely put on the same foreign ground, or is stated in terms from which the jury

may reasonably so understand it ; I think it impossible to say that there was no evidence that the contract work was done to the satisfaction of the architects.

On the indebitatus counts I agree that there was evidence of acceptance.

It is of course immaterial whether the acceptance is of such a character as to include a waiver of any defects in the fulfilment of the contract, and so to entitle to the contract price, or merely an acceptance of the work as it is, creating an implied contract to pay its value.

These machines are movable. The defendant says they can be taken away at pleasure, and he speaks of repeated notices to the plaintiffs to take them away. This distinguishes the case from *Munro v. Butt*, 8 E. & B. 738, which is relied on by the respondent. It is no doubt true, as stated in the judgment appealed from, that the machines "would be considered in a sense as part of the realty, for example, as between mortgagor and mortgagee of a warehouse ;" but the question cannot turn on their legal character as realty or personalty. The rule stated in *Munro v. Butt*, 8 E. & B. 738, will equally apply to work done on a chattel, as, *e. g.* fitting up the cabin of a steamboat.

The question is not whether in law the machines have become part of the realty ; but whether, as a matter of fact, they are made part of the defendant's land in such a manner as to deprive his possession of them of the significance as a fact in evidence which it would otherwise have. I do not understand *Munro v. Butt* to decide anything more than that the fact of possession of a building erected on one's land, or of repairs made on one's building, is not of itself evidence of acceptance. At the trial of *Roberts v. Watkins*, as noted in the report in 14 C. B. N. S. 592, Sir Wm. Erle was of opinion that the taking possession of a house dispensed with the certificate of satisfaction from the architect, which opinion he expressed after referring to *Munro v. Butt*.

In the present case there was more than mere possession of the buildings containing the machines. There was the user of the machines, and there was other evidence. Had

the question arisen prior to the letter of 31st August, 1871, or even prior to the alteration made in December of that year, the evidence of user could not have gone to the jury without the evidence that the machines were not yet like the agreed models; that the defendant was frequently complaining, and that the plaintiffs admitted their liability to do more, and did not insist on acceptance until they should have fitted them with wheels of the proper size. In that case it might have been a question whether, upon the whole evidence as it would have been presented, the jury could reasonably have come to the conclusion that acceptance was proved; and it might have been held, on the principle stated in *Wheelton v. Hardisty*, 8 E. & B. 232, and recognized in *Ryder v. Wombwell*, L. R. 4 Ex. 32, and other late cases, including *Campbell v. Hill*, in this Court, 23 C. P. 473, that there was not any proper evidence of acceptance for the jury. But after the alteration the case is very different; the plaintiffs had then made the machines like the models, or claimed that they had done so. As far as shewn to us they had no intention of making any further alterations, but meant to insist on their right to payment. The circumstance that this action was commenced some days before the fire removes the inference that further work was intended. The defendant says that he was told in December that the hoists were all finished and that he then tried them. Before the alteration he had been persistent in complaining. He had directed the letter of 31st August to be written, ordering the defective machines to be taken away and others substituted. He says that between June and December, he had told the plaintiffs six or seven times to take them away. Once he says he told the men so in Mr. *Gemmell's* presence. But he does not say, nor does any witness say, that after the alterations he made any complaints, or that the order to remove the machines was ever repeated after the alterations were undertaken. The defendant does indeed say, and so does one of the plaintiffs, that the complaints continued, but by that I understand only that the tenants continued to grumble at the want of power, particularly as Mr. Smith the architect says he

heard no complaints. If the circumstance of the defendant's leaving for the South on the 2nd January has any bearing at all it is not evidence of his dissatisfaction with things as he left them.

There is abundant evidence that the tenants used the hoists with the defendant's assent and authority. He says, "The tenants from the time they went in continued to use the hoists up to the time of the fire. We had to continue to use them." The necessity for using the hoists can only have been to avoid the inconvenience to the tenants of being without hoists, or the loss to the defendant of being without tenants. If damage had accrued from these causes, by reason of the plaintiffs' default, the defendant would have had his remedy. But if rather than risk such damages he preferred using the hoists, he can scarcely say that he was merely in possession of his building, as in the case of *Munro v. Butt*.

This question, namely, whether there is evidence reasonably sufficient to go to the jury, must frequently give rise to differences of opinion, as illustrated by the recent decision of the house of Lords, (which as yet has only reached us through the Weekly Notes), reversing the judgments of both the Queen's Bench and the Exchequer Chamber in *Bridges v. Directors, &c., of North London R. W. Co.*, L. R. 9 Q. B. 377 (a).

In the present case I cannot say that I have any doubt that there was evidence for the jury, and that the verdict ought to stand.

Appeal allowed.

(a) Since reported, in L. R. 7 H. L. 213.

MICHAELMAS TERM, 38 VIC., 1874.

From November 16th to December 6th.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.,
“ JOHN WELLINGTON GWYNNE, J.
“ THOMAS GALT, J.

WOOD V. THE ONTARIO AND QUEBEC R. W. CO.

R. W. Co.—Employment of agent—Contract under seal.

Held, under 34 Vict. ch. 48, the Act incorporating the Ontario and Quebec R. W. Co., and the Railway Act of 1868, that the defendants were empowered to appoint an agent to negotiate for and obtain municipal aid, and that for that purpose a resolution of the board of directors, or any entry or minute in their record of proceedings would have been sufficient, without the formality of a by-law or the seal of the company.

The plaintiff sued defendants for services performed by him as their agent in obtaining bonuses from the different municipalities through which the defendants' railroad was to pass, and the only evidence of his appointment was, a letter written by one of the directors, stating that at a meeting of the board he was directed to make arrangements with the plaintiff to proceed forthwith. It was shewn also that the president had recognized and adopted his services, and partially paid therefor: *Held*, that this was not sufficient proof of the plaintiff's engagement, or of the acceptance of his services by the company; but a new trial was granted without costs, to enable him to supply proper evidence if possible.

Declaration : on the common counts, for work and labour, &c., and account stated.

Pleas : never indebted, and payment. Issue.

The cause was tried before S. Richards, Q. C., sitting for Gwynne, J., without a jury, at Belleville, at the Spring Assizes of 1874.

The action was brought for services alleged to be rendered to the defendants by the plaintiff in what is called “working up bonuses” to the undertaking by the different municipalities through which the railroad was to pass.

The plaintiff claimed that he had secured by-laws for \$151,000, and on this amount he claimed 4 per cent. as his remuneration; or, putting it in another way, that his services were worth at the rate of \$4,000 per annum. The plaintiff proved that he had worked about seven months and that his expenses were about \$600. He claimed for

Seven months, at the rate of \$4,000 per year...	\$2,334
Expenses	600

\$2,934

Money credited as received on account.....	1,190
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Balance.....\$1,744

By statute 34 Vic., ch. 48, (passed 14th April, 1871) a company was incorporated to construct a railroad from Toronto to Ottawa, of certain named persons, and all future shareholders, with all the powers incident to railway corporations, and as conferred by the Railway Act, 1868.

Certain named persons were appointed a Board of Directors, to hold office till others should be appointed by the shareholders :

It was provided that the capital stock should not exceed \$1,250,000, &c., the money so raised to be applied, firstly, to pay the fees, expenses, and disbursements for procuring the passing of the Act, and making the survey, plans, and estimates connected with the railway, and all the rest of such money should be applied towards making, completing, and maintaining the said railway, and other purposes connected with the Act. (sec. 4.)

As soon as one-tenth of the capital stock, (which capital stock should not be less than \$500,000), should be subscribed, there should be a meeting of the stockholders, who should elect seven directors, to hold office to the first Tuesday in September following their election.

The railway was to be commenced within three years, and finished in eight years.

By sec. 5 the company could receive from persons or corporations, as aid, &c., lands, or personal property, or moneys, as gifts, or in payment of stock, &c.

Mr. Billa Flint was a director, and a strong friend of the plaintiff.

He stated, that at a meeting of the Board on the 28th May, 1872, Sir Hugh Allan in the Chair, the Directors discussed the subject of obtaining bonuses from the municipalities. He recommended the plaintiff as a suitable person to look after bonuses.

On the 30th May he wrote to the plaintiff, saying he had laid before the board the plaintiff's plan as to obtaining bonuses, with which the directors were much pleased: that he was asked as to what remuneration the plaintiff expected: that the directors told him to secure the plaintiff's services, and they would pay his expenses, and allow him as for similar work done by others. He advised him to accept these terms. The Board agreed to employ him.

On the 31st May Mr. Flint received a telegram from Sir Hugh Allan, saying that he wished him to secure the plaintiff's services for the whole length of the road.

The same day Mr. Flint wrote to the plaintiff the following letter:—

OTTAWA, 31st May, 1872.

"MY DEAR SIR,—Sir Hugh Allan telegraphs me to-night to try and secure your services at once for the work, as Laidlaw is not in a position to take the upper end of the route. What say you?

"In talk with Grover yesterday, he thinks that you can do nothing in Peterborough: that your course there on the Grand Junction will not meet the views of the people, and you would not be able to do anything with them. What say you?

"Please answer at once.

"Yours, &c.,

"A. F. WOOD, Esq., (Signed) "BILLA FLINT."

"Madoc."

On the 5th June Mr. Flint wrote again to the plaintiff.

"OTTAWA, 5th June, 1872.

"MY DEAR SIR,—Yours received, and I have to-day communicated its principal contents to Sir Hugh Allan.

"In reference to certain points : 1st, As to meeting of the board, I don't know ; should it be necessary, it can no doubt be done. I have not, however, called for a meeting, nor advised one. 2nd. I agree as to the bonus question, and advised accordingly, quoting your views. 3rd, As to engineer, I fully agree, and have recommended the same to Sir Hugh Allan. As to solicitor, Mr. Abbott thinks not best, and so do I ; but in case you need, employ one when the emergency, if any, may arise, as best seems meet. I have so declared and advised Sir Hugh.

"As to one of the directors to consult and work with. All right ; you can have Mr. Morris, at Perth, and myself at Hastings. I think, from what was said at the Board, that they throw the burden on me as to this matter ; but we shall see as we go on.

"As to commencing, the Board wants you to begin at once. I wrote Sir Hugh you would begin right after the County Council was over, which you would have to attend next week, so you can prepare matters to begin at once. I will help you all I can.

"Yours, &c.,

"A. F. WOOD, Esq., (Signed) "BILLA FLINT."
"Madoc."

"P. S.—I may not get home before next week, Tuesday night ; should I not, I will be with you, D.V., Wednesday morning. I do not suppose much business will be done on Tuesday afternoon. (Signed) "B. F."

Then, on June 15, 1872, a more formal letter was written.

"BELLEVILLE, 15th June, 1872.

"To A. F. Wood, Esq., }
"Warden, County of Hastings. }

"MY DEAR SIR,—At the meeting of the Board of Directors of the Quebec and Ontario Railway Company, held at Ottawa on the 28th May, Sir Hugh Allan in the Chair, I was appointed and instructed by the Board to make arrangements with you to work up the Bonus By-laws in the various counties and townships along the proposed route.

You will therefore proceed to commence at Madoc, as your Council meets on Monday, and get your by-law passed; and then it would be well to go to Lanark, Perth, and other places east of Hastings, and take such steps as you think most advisable to work up the bonuses; and for so doing, this shall be your sufficient authority.

"Yours, &c.,

(Signed)

"BILLA FLINT,

"Director O. & Q. Railway."

This letter would seem to be intended as the formal retainer of plaintiff.

The plaintiff then proceeded to work, and it was stated that he procured the passing of by-laws from various municipalities to \$150,000.

Mr. Flint said that there was no resolution of the Board passed that he was aware of for employment of the plaintiff. He was sent for, he said, while in the Senate chamber, to attend the meeting, and when he came the Board were discussing the matter of bonuses. He remained till the close of the meeting, and no resolution passed.

He said that all the communications that he afterwards had were with Sir Hugh Allan alone, and not with the Board of Directors, and that he was not aware of any resolution of the Board authorizing Sir Hugh Allan to employ the plaintiff or any one else. He said that the plaintiff had been paid from time to time on account of disbursements and services, in all about \$1,600, by drafts drawn by the plaintiff on Mr. Flint, and he drew on Sir Hugh Allan as president of the company. \$400 of this amount, however, was paid through the plaintiff to Mr. Rennie for a trial survey of a portion of the line. \$1,190 in all was credited by the plaintiff as received from the defendants.

The plaintiff swore, in substance, that no other arrangement was made than was contained in Mr. Flint's letters. He stated all his proceedings and services in getting the by-laws, holding meetings, and creating a public sentiment favorable to the enterprise.

He said he talked over with Sir H. Allan the subject of

his remuneration, and it was understood it should be as mentioned in Mr. Flint's letter.

He furnished copies of by-laws and reports to Mr. Flint to send to Sir Hugh Allan.

He said that in June, 1873, he had made up his mind to give up his employment, in consequence of Mr. Fowler being employed. In reply, he received a letter, dated the 9th June, 1873, from Mr. Flint, requesting him not to give it up.

A telegram was produced from Sir H. Allan to Mr. Flint, dated 16th January, 1873, : "Let Mr. Wood proceed in his endeavours to procure bonuses. Send to me at Montreal a report of what he has actually done."

The plaintiff left the employment in April, 1873. He first sent in an account.

He appeared to have had many communications with Mr. Flint. The latter recommended him to accept \$3,000 in full, and advised its being paid, and a draft for that amount was drawn by plaintiff on Sir H. Allan. The latter declined to pay, and wrote to Mr. Flint the following letter :

MONTREAL, 20th October, 1873.

"Hon. B. Flint, Belleville.

"DEAR SIR,—I don't think we are liable for any such sum as you say Mr. Wood claims for obtaining bonuses for the Ontario and Quebec R. R.

"The arrangement for his remuneration was altogether different; but to enable me to judge of what he really has done, I will thank you to send me copies of the by-laws for the grants he has actually obtained, with certificates from the clerks of the Councils that they are not disputed.

"Of course Perth and Lanark are not to be included, as I obtained them myself, and informed you that Mr. Wood was not to go there.

"Please understand that you are not to incur any liability in any form on account of the railroad company in future.

"Yours, truly,

(Signed)

"HUGH ALLAN."

Mr. Laidlaw and another witness supported the plaintiff's claim for payment at the rate mentioned.

No witnesses were called for the defence.

Bell, Q. C., for the defendants, objected that no binding contract was proved : that to be binding on the defendants, it could only be by by-law, or under seal ; and that the defendants could not employ their funds for such a purpose as to employ any persons to obtain bonuses.

The learned Queen's Counsel entered a verdict for the plaintiff for \$1,744, the amount claimed.

In Easter Term *H. Cameron*, Q. C., obtained a rule *nisi* to enter a verdict for the defendants, on the law and evidence : on the ground that there was no legal liability, there being no employment by by-law, resolution, contract under seal, or valid agreement ; and that the directors could not expend the moneys of the company for such purposes.

In Michaelmas Term *M. C. Cameron*, Q. C., shewed cause. The evidence shews that the plaintiff was employed by the railway company to procure the passage of by-laws for bonuses by the different municipalities through which the railway was to pass, and that he was to be paid for his services the same as others were paid for similar services, and it was proved that the amount charged was what was usually paid. The plaintiff procured the bonuses, and the company paid part of his claim. The defendants contend, that, as there was no formal resolution appointing him, he cannot recover ; but as the services were actually rendered, and the contract an executed contract, of which the company have received the benefit by accepting the by-laws and the debentures issued under them, the plaintiff is clearly entitled to recover the value of his services under the common counts. There is nothing illegal in the employment, as by 34 Vic., ch. 48, sec. 5, express authority is given to the company to obtain bonuses, and certainly, therefore, they have authority to employ a person to act for them in procuring them.

Hector Cameron, Q. C., contra. On the facts stated the

plaintiff was only to be paid the value of his services, and the amount claimed here is exorbitant. He cannot, however, recover at all, as there was no binding contract at law. The plaintiff should have been appointed by by-law, or under the seal of the company. The cases clearly shew that the seal can only be dispensed with in matters of trivial or every day occurrence, or where the urgency or necessity of the case would prevent the requirement being complied with, but not in a case like the present, where the employment is of the most unusual character: *Brice on Ultra Vires*, 306-12, and cases there collected; *South of Ireland Colliery Co. v. Waddle*, L. R. 4 C. P., 617; *Re Bonelli's Telegraph Co.*, L. R. 12 Eq. 246; *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341; *Browning v. Great Central Mining Co.*, 5 H. & N. 856; *Diggle v. London and Blackwall R. W. Co.*, 3 Ex. 442; *London Dock Co. v. Sinnott*, 8 E. & B. 347; *D'Arcy v. Tamar, Kit Hill, and Callington R. W. Co.*, L. R. 2 Ex. 158. But even if the seal may be dispensed with, there certainly should have been a resolution of the Board. Also, the employment of the plaintiff to procure bonuses was contrary to public policy, and therefore void.

HAGARTY, C. J., delivered the judgment of the Court.

We see no ground for interference on the question of amount of remuneration. No evidence was offered to impugn the plaintiff and his witnesses on that head. Rather large ideas on the subject of remuneration for services in railway matters seem to be prevalent of late years.

We need only discuss the legal objections.

We do not think that the objections can prevail as to the application of the company's funds to pay the plaintiff.

The evidence does not explain how far the company had proceeded when it resolved to apply for municipal aid. We think the Directors might, under their general statutable powers, and under the directions to apply their funds "towards making, completing, and maintaining the rail-

way," properly engage the services of an agent to negotiate for and obtain municipal aid, just as they might properly incur the expense of sending an agent to England to negotiate a loan, or sell stock or debentures.

Nor do we think that they must necessarily retain such agent by instrument under corporate seal or by-law.

The special Act directs that a majority of the Directors shall form a quorum for the transaction of business, and they may make notes and bills, made or endorsed by the President, and countersigned by the Secretary and Treasurer, and under the authority of a majority of a quorum of the Directors, and being so made, they shall be presumed to have been made with proper authority until the contrary be shewn.

The Railway Act of 1868 is extended to this company. (Sec. 1.)

Sec. 14, sub-sec. 13, declares that: "The act of a majority of a quorum of the Directors present at any meeting regularly held, shall be deemed the act of the Directors."

Sub-sec. 17. "The Directors shall make by-laws for the management of the stock, property, business," &c., "and for the appointment of all officers, servants, and artificers, and prescribing their respective duties."

Sub-sec. 18. "The Directors shall, from time to time, appoint such officers as they deem requisite," &c.

Sec. 19 directs "All by-laws, rules, and orders regularly made, shall be put into writing, and signed by the Chairman or person presiding at the meeting at which they are adopted, and be kept in the office of the company."

Sub-sec. 3 directs that "copies of the minutes of proceedings and resolutions * * of the Directors, at their meetings, extracted from the Minute-books, kept by the Secretary and by him certified to be true copies, extracted from such Minute-books, shall be evidence of such proceedings and resolutions in any Court."

We think the claim could be supported had there been evidence that the plaintiff's appointment was by a resolution of the Board, or evidenced by an entry or minute in the record of their proceedings.

The defendants could readily have proved how this was, by the production of their books or the evidence of their secretary. The plaintiff could also have, we presume, compelled the production of such proof. Neither party has thought proper so to do. The only evidence on the subject is that of Mr. Flint, who says he is not aware of any resolution appointing the plaintiff; he came to the Board meeting while the subject was under discussion. He remained to the end, and does not know of any resolution.

We must see what the plaintiff had as his warrant for entering upon this service.

Mr. Flint formally tells him in a letter signed "Billa Flint, Director O. & Q. Railway," that, "at the meeting of the Board of the Directors of the Quebec and Ontario Railway Company, held at Ottawa on 28th May, Sir Hugh Allan in the chair, I was appointed and instructed by the Board to make arrangements with you to work up the Bonus By-laws, &c. You will therefore proceed," &c.; "and by so doing this shall be your sufficient authority."

On receipt of this the plaintiff performed the services, communicating from time to time with the chairman, and apparently with the other Directors, and receiving moneys on account of his work through Mr. Flint.

The plaintiff thought no doubt on receipt of this letter that he was employed by the Company, and he might naturally suppose that his appointment and the deputation to Mr. Flint to settle details with him were all regularly entered in the Minute Book, as the written action of the Directors.

It is not suggested that Mr. Flint was acting on his individual power as a Director, or without the concurrence of the Board.

The true objection is, that there is a failure in the legal proof of such concurrence, and of such joint action of the Board as will bind the Company.

Had the plaintiff been so directed to furnish iron or other materials for building the road, and it was shewn the goods

he furnished were actually used by the Company in the road, there can be no doubt that he could enforce payment therefor as on an executed consideration.

Our own cases in Appeal, *Pim v. Corporation of Ontario*, 9. C. P. 304; *Buffalo and Lake Huron R. W. Co. v. Whitehead*, 8 Grant 157, fully discuss this position.

Had he been in the same manner appointed as a Clerk or Bookkeeper, and acted as such in the Company's office for a year, I think he would on the same principle recover the value of his services. Whatever was done by the plaintiff here was an executed consideration. But it is not so easy in this case to shew evidence of acceptance and adoption of the plaintiff's work and services as in the cases suggested, of goods supplied or services rendered in the ordinary places of business of the Company.

The acceptance of debentures or moneys from the municipalities would not assist much, as they would not be necessarily obtained by the plaintiff's exertions.

It is not easy to draw any hard and fast line. All cases of executed consideration must be more or less a question of degree.

The difficulty consists in this: Is there legal evidence that the Directors contracted with the plaintiff? If this can be answered in the affirmative our judgment must be for the plaintiff.

I assume, as is said by Bovill, C. J., in *South of Ireland Colliery Company v. Waddle*, L. R. 3 C. P. 463, at page 471, "The very constitution of the Company is, that the Directors should have power to make contracts such as was made here."

In the same case in Error, L. R. 4 C. P. 617, Cockburn, C. J., says, at page 618, "We are asked to overrule a long series of decisions in all our Courts, which, in accordance with sound sense, have held that the old rule as to contracting only under seal does not apply to corporations or companies constituted for the purpose of trading, and we are invited to re-introduce a relic of barbarous antiquity."

Sir William Erle says, in *Henderson v. Australian Mail Co.*, 5 E. & B. 409, at page 417: "I think myself that it is most inexpedient that corporations should be able to hold out to persons dealing with them the semblance of a contract, and then repudiate it because not under seal."

The same distinguished Judge says, in *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341, at page 346: "A trading corporation like the present holds a position intermediate between a municipal corporation and an ordinary co-partnership."

In this last case the Chairman of the Board made a parol agreement with the plaintiff, and wrote down the terms of it in the Company's Minute Book. Neither he nor any of the other Directors signed it. The plaintiff afterwards had a correspondence with the Company's Secretary on the subject. Accounts were sent in on the agreement to the Company; they were paid, and the amounts passed into the Company's books, which were audited. It was found as a fact that the services rendered by the plaintiff under the parol agreement were calculated to be beneficial to the Company in their business, but were not absolutely necessary."

It was held that the plaintiff could recover; that the contract was ratified by the Directors, and, as Lord Campbell said, "that is evidence both of ratification on their part, and also of previous authority given by them."

All the general law is fully discussed in *Taylor v. Chester and Midhurst R. W. Co.*, L. R. 2 Ex. 356, and in a very late case of *Riche v. Ashbury R. W. and Carriage Co.*, in Error, L. R. 9 Ex. 224.

I repeat, our difficulty here is in the absence of any written or recorded evidence of the joint action of the Directors.

In *Perry v. Corporation of Ottawa*, 23 U. C. R. 391, an architect sued the corporation for work and labour in preparing plans and reports. He was held entitled to recover, on the ground that he was employed to make them by a duly appointed committee of the council, which committee reported what had been done by them and by the plaintiff

under their orders to the council, and the latter by resolution adopted and approved the action of the committee.

Brown v. Corporation of Belleville, 30 U. C. R. 373, cites this last case as a strong authority. The plaintiff had offered to a committee of the council to do certain work. The committee reported this to the council, by whom their report was adopted. The chairman of the committee informed the plaintiff of it, and persuaded him to do the work at once.

Assuming the rules to be less rigid in the case of a trading corporation than in that of a municipality, there still seems a difficulty as to the sufficiency of the evidence here of a binding agreement. Although we consider the remuneration of the plaintiff for his services would not be an unlawful application of the defendants' funds, still his employment was for a very special business, and one at the best only collateral to the main purpose of the incorporation. It was not a matter of ordinary occurrence in the making and working of the railway.

Mr. Flint's letter would doubtless be fully sufficient to bind all his co-partners in an ordinary mercantile partnership. But we hesitate to hold it sufficient in the case before us. We think the plaintiff should have shewn what was done by the Board—what appears in the minutes of their proceedings—especially as Mr. Flint, as far as his knowledge extends, states there was no resolution passed. He does not appear to have been asked if any minute or entry was made or appears in the books.

It may perhaps be said that the defendants might have shewn how this was, or that as they omitted doing so it should be assumed against them that there was such entry or written authority.

The absence of any clear proof of acceptance or even of recognition of the plaintiff's services by any action of the Company, or that the latter, as in the common case of work or goods, were received in the ordinary course of business, creates the difficulty. The acceptance or enjoyment by the Company is evidence of their having contracted for the thing done, and agreed to pay for it.

There is evidence of Sir Hugh Allan having recognized and accepted the plaintiff's services, and partially paid therefor, but I am unable to fix the Company on his individual acts.

A very recent judgment of our Court of Queen's Bench, *Brown v. Corporation of Lindsay (a)*, is, we think, in accordance with the general views herein expressed.

We think we cannot let the verdict stand on this evidence, but that the plaintiff may have a new trial, to supply, if he can, the kind of evidence that we have pointed at as being required.

Under all the circumstances we direct a new trial without costs.

Rule absolute for new trial.

STOTT ET UX. V. THE GRAND TRUNK RAILWAY COMPANY.

R. W. Co.—Blowing off steam at highway crossing—Liability for.

While defendants' servants were employed in the attempt to replace on the track one of defendants' engines which had run off it, near a highway crossing, but within defendants' grounds, the female plaintiff, with another woman, approached the crossing with a horse and waggon, and asked defendants' servants if they might cross, when one of them said yes, and then one winked at the other and laughed. While she was crossing, she herself holding on to the horse by the head, and the other woman sitting in the waggon holding the reins, steam was let off through the sides of the engine, and the horse becoming frightened knocked down the female plaintiff and injured her.

Held, an actionable wrong for which the defendants were liable.

Held also that there was clearly no evidence of contributory negligence, as every precaution was used in crossing.

Semble, that even if the act was an unnecessary and wanton act on the part of defendants' servants, the defendants would still be liable, for it was done in the course of their (the servants) service and employment, and for the purpose, though ignorantly, of promoting the object of it.

THIS was an action against the defendants for the careless and improper management by defendants' servants of one of the defendants' engines, whereby the plaintiff was injured.

The cause was tried before Morrison, J., and a jury, at London, at the Fall Assizes of 1874.

(a) Since reported in 35 U. C. R. 509.

The undisputed evidence was, that an engine of the defendants was off the track within their own grounds, but quite close to a public highway, across which there was very considerable traffic in the City of London; and that the defendants were, at the time when the act complained of was committed, engaged in the service of the defendants, endeavoring to get the engine upon the track again. While the engine was in this position, the female plaintiff, with a horse and light waggon, had occasion, in the pursuit of her husband's business, to cross the track upon this highway.

As to all that occurred subsequently the facts were disputed.

The female plaintiff alleged that, seeing the engine where it was, and the defendants' servants engaged at it, before venturing to cross the track, she called to the servants so engaged, and enquired whether she could pass; to which one of the men replied "Yes," and then one of them, as she said, winked to the other and laughed. The men, she said, were doing something with the engine, and as she, with the horse and waggon, was crossing the track, the persons at the engine let off steam, which came out of the side of the engine (not by the steam whistle), which started the horse, by the side of which she was walking for greater caution, another woman being in the waggon having hold of the reins; the horse jumped upon the female plaintiff, knocked her down, ran over her, and ran away, doing the damage for which the action was brought. The horse, according to her evidence, was a very quiet one, and the sole cause of the damage was the letting off the steam at the untimely moment when the female plaintiff was crossing the track, lulled into security by the invitation, direction, or suggestion of the defendants' servants.

Mary Waterhouse, who was with the female plaintiff at the time, and who was in the waggon holding the reins, confirmed the evidence of Mrs. Stott in every material particular. She said that Mrs. Stott asked the men if she

could cross: that they told her she could: that the steam was blown off as she was crossing the track, whereupon the horse, taking fright, jumped upon Mrs. Stott, ran over her, and ran away. The steam, as she also said, was blown off from the sides of the engine, while the horse was crossing the track, and that Mrs. Stott was holding it by the head, and witness in the waggon holding the reins.

George Beacham stated that he was helping to get the engine on to the track, and saw the accident: that he saw the horse jump up, and run away: that he saw the steam at one time going off, but did not know whether it was that which frightened the horse: that when the horse started off he followed, got up to the waggon, and stopped the horse.

At the close of the plaintiff's case a nonsuit was moved for on the grounds: 1. That the engine was lawfully where it was, and the defendants had the right to blow off steam. 2. That the plaintiff was guilty of contributory negligence. 3. That if the defendants' servants blew off the steam wantonly, then defendants were not responsible for their acts, and that the fact of the servants laughing was evidence of an improper and wanton act.

The learned Judge overruled the objections.

For the defence four witnesses were called, who were all engaged at the engine, three of whom were servants of the defendants. They all saw the horse jumping up on to the female plaintiff, knocking her down, and running away, but all denied that any steam at all was let off. They could not, however, suggest any reason for the accident.

The engineer, who was the only person upon the engine, and the fireman, denied that the female plaintiff asked whether she could proceed or not, or that they or any one answered that she could, or that one winked to the other and laughed.

The learned Judge left it to the jury to say whether they believed the witnesses for the plaintiffs or those for the defendants; telling them if they believed the latter to find for the defendants, but that if they believed the witnesses

for the plaintiffs, and that the servants of the company, in the course of their employment, let off the steam as alleged, although unnecessarily, and that this frightened the horse, and so caused the damage, to find for the plaintiffs.

The jury found for the plaintiffs.

In this term *Bell*, Q.C., (of Belleville), obtained a rule *nisi* to set aside the verdict entered for the plaintiffs, and to enter a nonsuit, on the ground that the female plaintiff was guilty of contributory negligence; also, that there was no evidence to go to the jury of negligence by the defendants, and that if the act was wanton the defendants were not liable; or for a new trial on the law, evidence and weight of evidence.

In the same term *Bartram* shewed cause. The evidence shews that the engine was standing close to the highway-crossing, where there is considerable traffic, and the plaintiff, wishing to cross, enquired of those in charge of the engine if she could do so, and they said she could; and then, while she was crossing, the steam was wilfully and wantonly let off through the mudcocks, which frightened the horse and caused the accident. *Manchester South Junction, &c. R. W. Co. v. Fullarton*, 14 C. B. N. S. 54, is exactly in point, and clearly shews that in such a case the company are liable. The defendants attempt to escape liability by saying that it was a wilful and wanton act on the part of their servants, but it was done in the course of their business and employment, and therefore the Company are liable: *Limpus v. London General Omnibus Co.*, 1 H. & C. 526. There was clearly no contributory negligence, as it is shewn that every precaution was used in crossing.

McMichael, Q.C., contra. The evidence shews that the engine was off the track, and the defendants' servants were trying to get it on, and in making the attempt the steam may have been necessarily blown off. The defendants, however, deny that any steam was let off, or that the plaintiff ever asked for or obtained leave to cross. The engine was lawfully where it was, and what was done was lawfully done, and what it was the duty of those in charge

of the engine to do, namely, to get the engine on the track, and therefore no liability attaches to the defendants. But assuming the act to be done as stated by the plaintiff, there is clearly no liability, as it was a wilful and wanton act not done in the course of the business or in the employment of the Company. There was, moreover, such contributory negligence as would prevent the plaintiffs recovering.

GWYNNE, J.—As to the point raised of there being contributory negligence, I fail to see any evidence of any negligence, much less such undisputed evidence of negligence upon the part of the plaintiffs contributory to the accident, which would have justified the entry of a nonsuit by the learned Judge who tried the cause. I find it difficult to understand how the parties could have exhibited greater care. Before attempting to cross the track, which they had a right to do, they ask the defendants' servants if they can safely proceed; they are told they can, and they proceed accordingly, depending on the assurance, one holding the horse by the head, the other in the waggon holding the reins.

The learned Judge was not asked specifically to put it to the jury to say whether, admitting the steam to have been blown off as alleged by plaintiff's witnesses, it was an act done by the servants in the course of the defendants' service and employment, and for the advancement of the object they had then in hand; or, on the contrary, an act out of the course of such service and employment, committed by the servants of their own wilful wantonness to effect a purpose of their own. Their reason for not asking the question to be so put was, perhaps, because the defendants so strongly relied upon the defence that no steam had been let off.

We are now asked (the jury having rendered a verdict in favor of the plaintiffs), in the absence of any complaint as to the manner in which the case was left to the jury, to say: 1. That there was no evidence to go to the jury; or 2. That their verdict is altogether against the evidence.

The contention of the learned counsel for the defendants, before us, was, that if the steam was blown off, it was done by the servants of the defendants unnecessarily and wantonly, and that, therefore, the defendants are not liable; and secondly, that the weight of the evidence was that it was not blown off at all.

It was argued that the evidence given on behalf of the plaintiffs, that when the female plaintiff was told that she might cross, one of the servants of defendants winked at the other and laughed, shewed the act of blowing off the steam to be the wanton and reckless act of the persons blowing it off, not in the course of the service and employment of the defendants.

This may be evidence to go to a jury to lead them to the conclusion that the act was the wilful and wanton act of defendants' servants, apart wholly from their service and employment; but upon such evidence it would be impossible to nonsuit a plaintiff. *Limpus v. London General Omnibus Co.*, 1 H. & C. 526, is an authority that the unnecessary, wanton, reckless, and improper character of the act would not relieve the defendants, if it was done by their servants in the course of their service and employment, and for the purpose, although ignorantly, of promoting the object of the employment in which they were engaged.

I am clearly of opinion that there can be no nonsuit.

Then as to the verdict being against the evidence, I do not feel justified in interfering. The jury saw all the witnesses, and they have come to the conclusion that the steam was let off, and I must conclude also that they believed the evidence given as to the female plaintiff having enquired whether she might proceed, and that she was told in reply that she might, and that the damage was caused by the letting off steam.

Under these circumstances I think there can be no doubt that the act of letting off the steam, however lawful the act, was an actionable wrong to the plaintiffs: *Manchester South Junction, &c. R. W. v. Fullarton*, 14 C. B. N. S.

54. The learned judge told the jury, and as to his mode of submitting this point to the jury there is no complaint, that if the steam was let off by the defendants *in the course of their employment, although it was an unnecessary act*, the defendants would be liable.

The verdict establishes therefore, I think, that it was the opinion of the jury that not only the steam was let off, but that it was let off in the course of the employment of the defendants' servants; and in a matter of such contradictory evidence, that is to say, the evidence offered by the plaintiffs was so contradicted by the witnesses for the defendants, that I do not think that we should interfere with their finding upon the facts; the point turning, as it does, wholly upon the credibility of witnesses.

I think, therefore, that the rule should be discharged.

HAGARTY, C. J.—The strong attempt of defendants to prove that no steam was in fact let off, rebuts any presumption that the act complained of was not done in the ordinary discharge of duty by those in charge of the engine. Then if done, as the plaintiff suggests it was done, wholly unnecessarily, and in such a way and at such a moment as to inflict an actionable wrong and injury on the plaintiff as she was lawfully crossing the highway over the track in front of the engine, without a finding by the jury that the act was done as a wholly unnecessary, wanton and reckless act by the servants, not in any way in the discharge of their duty, but from some private evil or mischievous motive of their own, I am not prepared to consider how the law is on such a state of fact.

I agree in thinking that we cannot interfere as the case appears before us.

GALT, J., concurred.

Rule discharged.

THE BANK OF BRITISH NORTH AMERICA V. SIMPSON.

Agreement—Signed only by one party—Penalty or liquidated damages.

Where an agreement contains the names of the two contracting parties, the subject matter of the contract, and the promise, it is binding on the party signing it, although not signed by the other party.

In this case the defendant entered into a written agreement, whereby, in consideration of a certain salary and allowances to be paid to him by the plaintiffs, he agreed to serve them in their business as bankers for three years, and if he should leave within that period to pay them \$400, as liquidated damages. The agreement was signed by the defendant, but not by the bank:

Held, that defendant was bound by it; and having left without excuse, was liable for the \$400, which was recoverable as liquidated damages, and not as a penalty.

DECLARATION: Setting out a written agreement, whereby the defendant, for certain salary, &c., agreed to serve the plaintiffs for three years as a clerk, with a proviso that if he left the plaintiffs' service during the three years, without their assent, he should forfeit and pay \$400 as liquidated damages for such breach of contract; and averring, as a breach, that he did so leave, &c., whereby the plaintiffs suffered damage, claiming \$500.

Pleas: 1. Traversing the agreement. 2. That the plaintiffs did not agree to pay the defendant any salary, &c. 3. That the agreement was not duly stamped. 4. Fraud. 5. Setting out another subsequent agreement for service. 6. Set-off. Issue.

The cause was tried before Patterson, J., and a jury, at Hamilton, at the Fall Assizes of 1874.

It was proved that the defendant entered the plaintiffs' service in Scotland, under a written agreement, at a specified salary: that the plaintiffs paid his expenses out: that he stayed with them two years and a half as a clerk, and then left.

According to his own evidence he left, being dissatisfied. He admitted having received salary all the time he was there.

There appeared to be no excuse for his leaving beyond his own dissatisfaction.

The defendant said he signed the agreement, understanding it to be, as he was told, a matter of form only. The Judge ruled that there was no evidence of fraud.

The agreement was dated the 26th of January, 1872, and professed to be between the defendant of the one part, and the plaintiffs of the other part. The defendant, in consideration of the salary and allowances thereafter agreed to be paid by the Bank, agreed to serve them for three years from the date thereof; and, after other provisions, "doth declare and agree that if the said W. Simpson shall decline or shall discontinue to serve the said Bank during the said period of three years without their consent, then the said W. Simpson shall forfeit and pay to the directors for the time being of the said Bank, the sum of \$400, as liquidated damages for such breach of contract." The Bank, in consideration of his services, did agree thereby to pay him, during the continuance of the agreement, a salary at the rate of \$700 per annum, and to pay his passage out, and travelling expenses; with power to the plaintiffs to dismiss him on certain contingencies.

It was also provided that after the three years the defendant might leave on giving a certain notice; but that if he quitted without six months' notice, he should forfeit and pay to the Bank a sum equal to two months' salary for each month which should be unexpired of said six months' notice, to be deducted from any salary coming due to him, or in default the same should be recovered in due course of law as liquidated damages, with full costs of suit.

"As witness the hand of the said William Simpson."

Neither the Bank nor any person for them executed the agreement. Although, commencing as being *inter partes*, the conclusion only seemed to contemplate an execution by the defendant.

On the evidence it seemed that the Bank duly performed their part of the contract, as if they had executed it.

It was objected on behalf of the defendants: 1. That the action failed, because the plaintiffs, never having executed the agreement, were not bound thereby, and therefore

there was no mutuality. 2. That the \$400 was only a penalty, and could not be recovered as liquidated damages.

The learned Judge reserved leave to move for a nonsuit on the first point. As to the second he left it to the jury to say what damages the plaintiffs had sustained by the defendant leaving their service, but reserved leave to the plaintiffs to move to increase the verdict to \$400, if the Court should be of opinion that the plaintiffs were entitled to such sum as liquidated damages.

The jury found for the defendant.

The learned Judge noted that he considered it a perverse verdict, and that the plaintiffs ought to have a new trial unless the defendant could shew that no action would lie.

In this term *Duff* obtained a rule *nisi* to set aside the verdict entered for the defendant, and enter a verdict for the plaintiffs, for \$400, on the leave reserved, and on the Law Reform Act; or for a new trial on the law and evidence, and the Judge's charge.

In the same term *Mackelcan* shewed cause. The agreement is void for want of mutuality, as it is not signed by the Bank. There is no consideration for the defendant's promise, and therefore no obligation upon him to serve the Bank: *Lees v. Whitcomb*, 5 Bing. 34; *Sykes v. Dixon*, 9 A. & E. 693; *Aspdin v. Austin*, 5 Q. B. 671; *Findlay v. Bristol and Exeter R. W. Co.*, 7 Ex. 409; *East London Waterworks Co. v. Bailey*, 4 Bing. 283. The contract not being under seal and being executory cannot be enforced: *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 17. As to damages, the parties intended that the \$400 should be considered as a penalty, and not as liquidated damages. The rule is, that the damages are to be deemed to be liquidated, where there is no precise mode of ascertaining them; but there is no difficulty here in ascertaining them; it must be considered therefore to be a penalty, and the Bank can only recover for the actual damage they have sustained, and the jury have found that they have not sustained any: *Boys v. Ancell*, 5 Bing. N. C. 390; *Betts v. Burch*, 4 H. & N.

506; *Hinton v. Sparkes*, L. R. 3 C. P. 161; *Sainter v. Ferguson*, 7 C. B. 716. Moreover, the plaintiffs do not sue for liquidated damages, and an amendment should not be now allowed. It must also be considered that the defendant was told that the agreement was a mere matter of form, and as such signed it.

Duff, contra. There is no necessity for the Bank to have signed the agreement so as to enable them to sue, for all that the statute requires is, that the contract be signed by the party to be charged. The agreement in all respects complies with the statute. It contains the subject matter of the contract, the consideration and the promise, and is signed by the party to be charged. The contract, however, might have been made by parol, and the mere bringing of the action, and setting out the contract would be sufficient. The evidence shews that, as far as the Bank were concerned, the contract was completely executed. They paid the defendant's passage out and his salary up to the time he left their employment: *Australian Royal Mail Steam Navigation Co. v. Marzetti*, 11 Ex. 228; *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620; *Fishmongers' Co. v. Robertson*, 5 M. & G. 131. As to damages, the agreement clearly shews that liquidated damages and not a penalty were intended; and this is just that class of cases where there is no mode of ascertaining the precise damage: *Price v. Green*, 16 M. & W. 346; *Reynolds v. Bridge*, 6 E. & B. 528; *Rutherford v. Stovel*, 12 C. P. 9.

HAGARTY, C. J.—The Judge very properly ruled at the trial that there was no evidence of fraud. The placing of such a plea on the record seems, in such a case, a most improper and unwarranted proceeding.

As to the first point raised it must be decided against the defendant.

Lees v. Whitcomb, 5 Bing. 34, is the chief authority relied on. The defendant had signed an agreement to remain with the plaintiff for two years, for the purpose of learning the business of a dressmaker. The plaintiff did

not sign; and it was held inoperative, in fact *nudum pactum*, there being no consideration, and no obligation to teach.

Laythoarp v. Bryant, 2 Bing. N. C. 735, points out the distinction in the last case. Tindal, C. J., fully points out the state of the law. It was a case for sale of lands under the 4th section of the Statute of Frauds. He says, at page 743: "The defendant might have required the vendor's signature to the contract; but the object of the statute was to secure the defendant's. * * Here when this party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument, between the *consideration* of an agreement and *mutuality* of claims. It is true the consideration must appear on the face of the agreement. * * But I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement, in truth, is made before any signature."

He notices the numerous cases where defendant's signature is alone required. A letter from an executor promising to pay; an engagement to pay the debt of another; or a guarantee by a surety, &c.

The Liverpool Borough Bank v. Eccles, 4 H. & N. 139, is strongly in point, and approves of the last cited case.

The declaration alleged that J. Eccles & Co. being largely indebted to the plaintiffs, by an agreement in writing purporting to be made between the defendants, the said J. E. & Co., and the Bank, in consideration of the Bank agreeing, as therein contained, the defendants agreed they would pay all moneys due from J. E. & Co. to the Bank, not exceeding £35,000; and that they should not be called on to pay, except by instalments at named dates ranging over some years, and that till all was paid, the Bank would not claim payment of a debt of £15,000 due to them by the defendants. The declaration then averred performance of all things by the Bank, and set out as a breach the nonpayment of the instalments due by J. E. & Co.

The plea was, that the agreement had never been signed, executed, or agreed to by the Bank.

Martin, B., notices the case of *Laythoarp v. Bryant*, as a binding authority, and says the presumption was, that the document, having been signed and handed to the Bank, was intended to be binding.

Watson, B., said that he did not see why the Bank could not sign it, or be compelled to sign it now.

As to the second point. I am of opinion that the plaintiffs were entitled to claim the \$400 as liquidated damages. It is the compensation specially agreed on for the breach of one distinct contract, namely, not to leave without consent for three years.

It is laid down in the notes to *Gainsford v. Griffith*, 1 Wms. Saund, ed. 1871, p. 74: "The law, nevertheless, remains unshaken, that parties may, by their mutual agreement, settle the amount of damages, *uncertain in their nature*, in performance or omission, of *a particular specified act*, at any sum upon which they may agree: and such sum may be recovered as liquidated damages."

The case before us is not open to the objection that there is one sum provided for the breach of many matters, great and small; nor is it for a breach of a matter readily to be estimated, such as the payment of a named sum.

Reynolds v. Bridge, 6 E. & B. 528; *Mercer v. Irving*, E. B. & E. 563, may be referred to.

We are told by the cases always in these matters to try and find out what the parties really meant. I have no doubt whatever of their meaning in the provision before us. I have no right to say that instead of the defendant agreeing to pay \$400 if he broke this distinct and express stipulation, he only agreed to pay such damages as the plaintiffs could prove they actually sustained by his default.

GWYNNE, J.—*Wain v. Walters*, 5 East 10, and *Lees v. Whitcomb*, 5 Bing. 34, proceeded upon the ground that there was no consideration stated in the agreement, as there should be within the 4th section of the Statute of Frauds, to support the defendant's promise.

Laythoarp v. Bryant, 2 Bing. N.C. 742, is clear authority

for the proposition, that where a contract contains the names of the contracting parties, the subject matter of the contract, the consideration, and the promise, it is binding upon the party signing it, although not signed by the other party to the contract.

In the case before us all the requirements are present necessary to charge the defendant. In consideration of a certain sum to be paid to him per annum by the plaintiffs, he promises to serve them as a clerk in their business of bankers, and if he should leave them within the period of three years, he agrees to pay them the sum of \$400, admitted to be agreed upon as liquidated damages. The defendant has received the consideration for his promise, but has made default in its fulfilment, and has therefore incurred the liability to pay the plaintiffs the \$400, which I agree in thinking to be liquidated damages recoverable in this action, and not a penalty.

The learned Judge before whom the case was tried reserved leave to the plaintiffs to move to increase such damages as might be found for them to the sum of \$400, if the Court should be of opinion that it was recoverable as liquidated damages. The learned Judge was clearly of opinion that the plaintiffs were entitled to some damages, but the jury rendered a verdict for the defendant.

It was argued before us, as if both parties agreed that notwithstanding this verdict and the *form* of the reservation, the question to be decided was, whether or not the plaintiffs were, in law, entitled to recover the \$400 as liquidated damages agreed upon.

I think they are as much entitled now to have that verdict entered for them, although the verdict has been rendered for the defendant, as they would have been to *increase* it to that sum if a small verdict had been rendered in their favor. Even where no leave is reserved, it is now provided by 37 Vic. ch. 7, sec. 33, O., that "every verdict shall be considered by the Court in all motions affecting the same, as if leave had been reserved at the trial to move in any manner respecting the verdict, and in like manner

as if the assent of the parties had been expressly given for that purpose."

A literal construction of this section would seem to warrant the Court, *in every case*, whether a verdict has been rendered by a jury or by a Judge, to set aside that verdict, and to enter one for the plaintiff, if the Court should be of opinion that, *upon the evidence*, the verdict should be for the plaintiff, in the same manner as that might have been done formerly where leave was specially reserved for the purpose. But whether this section is or not to have this universal application in all cases, I do not think there is any doubt in the case before us, if the reservation made at the trial is insufficient for the purpose, that we should avail ourselves of this section to order a verdict to be entered for the plaintiffs for the \$400, which we think them entitled to recover, as the sending of the case again to a jury could only entail additional expense upon the defendant to no purpose.

The rule will be to enter a verdict for the plaintiffs for \$400.

GALT, J., concurred.

Rule absolute.

THE ROYAL CANADIAN BANK V. WILSON ET AL.

Bill of exchange—Acceptance by one partner for separate debt, and not in partnership name—Liability of co-partners.

Where the plaintiffs, a bank, discounted a bill drawn by one partner, and accepted by him in the name of the firm, the Manager being aware that it was intended by such partner to reimburse himself for moneys which he alleged that he had advanced to the firm; and it appeared that such acceptance was unauthorized by the other partners: *Held*, that the bank could not recover against them.

The partnership name, when the bill was so drawn and accepted, was J. S. W. & Co., and the acceptance was in the name of W. M. & Co. *Held*, that this also would have been fatal to the plaintiffs' recovery.

DECLARATION on a bill of exchange drawn by one J. C. McCarthy upon and directed to the defendants, trading under the name, style, and firm of Wilson, Moul & Co., and purporting to be accepted by them.

The cause was tried before Patterson, J., without a jury, at Hamilton, at the Fall Assizes of 1874.

Pleas: non-acceptance, and payment.

From the evidence it appeared that a partnership had been formed between the defendants and McCarthy to carry on a lumber business at Barrie, at which place the defendants resided, while McCarthy lived at Hamilton.

On the 21st January, 1874, the day on which the Bill of Exchange was dated, McCarthy called at the office of the plaintiffs, at Hamilton, and presented the bill for discount.

The following is a statement of what took place as told by the Manager: "I am the Manager here of the Royal Canadian Bank. I know J. C. McCarthy. I discounted the Bill of Exchange (produced) for McCarthy. It was brought by him, and was discounted and put to his credit in the ordinary course of business. I said to him, 'McCarthy, this seems to me to be all in your handwriting.' He said, 'Yes; I am a partner in the firm, and have the power of signing the name'; and he told me the firm was composed of Wilson, Moul, and himself. I asked him some particulars of what he was going to do with the money. He said he had furnished the firm money from time to time

to carry on the business. He did not say where this money was to go. I put it to his credit. He gave me to understand, or I inferred from what he told me, that he did the greater part of the financing of the firm. When I discounted the bill I understood that part of the money was going to the firm, and he explained that he was getting it done here because he was better known here than they were in Barrie. I took his word, and discounted the paper on the strength of what he told me. McCarthy said he was furnishing funds from time to time. I did not mean to say that any part of this money was to go to Barrie, but that it was to refund money which from time to time he had advanced them."

John S. Wilson, one of the defendants, was called as a witness by the plaintiffs. He gave evidence which satisfied the learned Judge that at the time when this bill was drawn and accepted in the name of Wilson, Moul & Co., the partnership name was J. S. Wilson & Co., and not Wilson, Moul & Co.; also that McCarthy had no right to accept a bill as between himself and the defendants; and that the bill was not in fact for partnership purposes, but was for the private purposes of McCarthy. And the learned Judge entered a verdict for the defendants.

In this term *R. Martin* obtained a rule *nisi* to set aside the verdict entered for the defendants and to enter a verdict for the plaintiffs under the Administration of Justice Act, 1874.

In the same term, *McCarthy*, Q.C., shewed cause. The first point is, that the bill is drawn and accepted in the name of Wilson, Moul & Co., and the evidence clearly shews that at this time there was no such firm; but that it was J. S. Wilson & Co. It is quite clear that a partner has no implied authority to bind his co-partner by his acceptance of a bill of exchange, except in the true style of the partnership. *Kirk v. Blurton*, 9 M. & W. 284, is exactly in point. There the partnership name was John Blurton, and one of the partners accepted a bill in the

name of John Blurton & Co., and it was held that the other partners were not liable. See also *Byles on Bills*, 11th ed., 44, and *Sheppard v. Davy*, referred to in the notes. The next point is, that the acceptance was given for the private debt of McCarthy, and not for the purposes of the partnership, and that therefore the other partners were not liable upon it. To make them liable it must be shewn that it was given with their consent, which it is clear here that they did not give: *Byles on Bills*, 11th ed., 45-6.

R. Martin, contra. The evidence shews that at the time of the transaction, and long before the bill was drawn, the name of the firm was Wilson, Moul & Co., and that J. S. Wilson & Co. was only a name used by them in Barrie, for the purpose of enabling them to draw against each other. There is no necessity for using the exact name of the firm, but it is sufficient if it be the equivalent; and the case of *Kirk v. Blurton* has not been followed in the subsequent cases: *Maclae v. Sutherland*, 3 E. & B. 25; *Forbes v. Marshall*, 11 Ex. 166; *Lloyd v. Ashby*, 2 B. & Ad. 23; *Williamson v. Johnson*, 1 B. & C. 146. As to the other point, when the bill was taken to the Bank it was a proper document, and the transaction was complete. It makes no difference for what purpose the bill was taken so long as the Bank Manager had not notice of any fraud in the inception of the transaction, or that the consent of the co-partners had not been obtained, and the evidence shews that he had not such notice: *Swan v. Steele*, 7 East 210; *Wintle v. Crowther*, 1 C. & J. 316.

GALT, J., delivered the judgment of the Court.

It was contended by Mr. Martin that because the bill when produced to the Bank Manager was in a perfect state—that is to say, with the acceptance of the drawee—it was not incumbent on him to make any inquiry into the circumstances under which it was drawn and accepted, and that the only question that arises on this case is, whether there was a partnership of Wilson, Moul & Co., and whether McCarthy was a member of it.

But in answer to this position, it is proved that the Manager did make inquiry into the origin of the bill, remarking that the acceptance was in the handwriting of McCarthy, the drawer. There is also another conclusive fact, namely, that the bill is dated at Hamilton on the same day as it was presented for discount there, and McCarthy told the Manager that Wilson and Moule resided at Barrie, so that beyond all question he knew that McCarthy had not only drawn but accepted the bill. He was further informed that it was drawn and accepted for the purpose of recouping McCarthy for advances which he asserted he had previously made on behalf of the firm.

The Manager then had express notice that the right which McCarthy claimed to pledge the partnership for this debt arose from their being indebted to him, and consequently the right of the plaintiff to hold these defendants liable depended on the truth of the statement made by him.

I can discover no difference in principle between the case of a party taking a partnership liability in discharge of an antecedent private debt due to him from one of the partners, and that of a person receiving a bill drawn by him in the name of the firm on the false allegation that the firm were indebted to him for advances previously made.

The law, as regards the first point, is clearly settled by the case of *Leverson v. Lane et al.*, 13 C. B. N. S. 278.

On the trial of that case the Lord Chief Justice, in the course of his summing up, told the jury "that if one partner gave the acceptance of the firm in discharge of his own separate debt, the presumption was, that he did so without the authority of his co-partner, and that it lay upon the person who took the security to shew that it was given with the authority of the other partner."

This direction was complained of, and a motion was made for a rule *nisi* for a new trial.

The application was refused, and Byles, J., in his judgment, says: "I agree with all that has been said by my brother Williams; and I think we should be

most unjustifiably unsettling the law if we were to grant a rule upon this ground."

In the case of *In re Riches*, 4 DeG. J. & S. 581, there is an express recognition of the second point. Lord Westbury says: "Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes. If the business of the partnership is such as ordinarily requires bills of exchange, then, unless restrained by agreement, any one partner may draw, accept, and endorse bills of exchange in the name of the partnership for partnership purposes. All persons may give credit to his acts, and his authority, unless they have notice or reason to believe that the thing done in the partnership name is done for the private purpose or on the separate account of the partner doing it. In that case, authority by virtue of the partnership contract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority. If he do not so act, he must depend upon the right of the partner or on circumstances sufficient to repel the presumption of fraud," &c. "*It is immaterial whether the partnership security is applied in discharge of an existing debt or whether it is used by the individual partner for the purpose of obtaining money from his own Bankers to be applied for his own personal purposes,*"

The law as laid down in these cases is, in my opinion, conclusive against the right of the plaintiffs to recover.

But there is another point which would be fatal to their right—namely, that the acceptance is not in the name of the partnership as it existed when the bill was drawn and accepted. The then partnership style was J. S. Wilson & Co., and it was not until the month of March following, that the name Wilson, Moul & Co. was used. *Kirk v. Blurton*, 9 M. & W. 284, is an express authority on this head.

This, as a fact, was so found by the learned Judge, and we see no reason to dissent from his finding.

Rule discharged.

WALSH V. JOHNSON.

Right of way.

Held, that the cases of Johnson v. Boyle, as reported in 8 U. C. R. 142, and 11 U. C. R. 101, taken in connection with the evidence given in this case, and set out below, only established a right of way in the plaintiff over the east half of lot 23, in the 9th concession of Markham to the concession line between the 8th and 9th concession, but none over the west half of the lot.

DECLARATION: that the plaintiff was possessed of a messuage, and was entitled to a right of way from the said messuage over a certain close to a public highway, and back again from the said public highway over the said close to the said messuage, for himself and his servants, on foot, and with horses, cattle, and carriages at all times of the year; and that the defendant wrongfully obstructed the said way.

Pleas: not guilty; and that the plaintiff was not entitled to the right of way as alleged. Issue.

The cause was tried before Hagarty, C. J. C. P., without a jury, at Toronto, at the Spring Assizes of 1874.

In the particulars of the plaintiff's claim attached to the record, the right of way claimed was said to be "A right of way over a certain road in the township of Markham, which road runs through lot 23, from the line between concessions nine and ten, as shewn on a plan annexed; the western portion of said lot 23 being in the possession of the defendant, and the eastern portion in possession of one John Boyle. Also a right of way from part of lot 24, occupied by the plaintiff, to the said road." And the obstruction complained of was, "that the portion of the said road running through that part of lot 23 owned by the defendant, had been obstructed."

The whole complaint and enquiry on the trial was, as to the plaintiff's right of way over that part of the road alleged in the particulars as extending upon, over, and across lot No. 23, from the 10th to the 9th concession lines, in that part which is situated upon the west half of lot 23, the obstruction being admitted.

It appeared that the plaintiff was in possession of the west fifty acres of the east half of lot No. 24, in the 9th concession of Markham, as tenant of one Trueman P. White, who had purchased from one Cornelius Johnson, the plaintiff in two actions of *Johnson v. Boyle*, reported in 8 U. C. R. 142, and 11 U. C. R. 101. The only access which the owner for the time being of the west 50 acres of the east half of lot No. 24 had to the concession lines, in front of the east half and to that in front of the west half of the lot 24, was by a private way from the west half of the east half of lot 24 to the road which he alleged, existed across lot 23, from the concession line between the 9th and 10th concessions to the concession line between the 9th and 8th concession lines; and he claimed a right of way absolutely along such last mentioned road to the east—that is, to the concession line between the 9th and 10th concessions; and to the west, to the concession line between the 9th and 8th concessions.

To establish this right he relied upon the recovery in the former actions of *Johnson v. Boyle*; and it was agreed at the trial that the recital of the title and of the facts reported in the above cases, 8 U. C. R. and 11 U. C. R., should be taken as evidence in this cause.

The defendant's contention was, that the former actions only decided that the owners of the west half of the east half of lot 24, had a private right of way from 24 to the road across 23, and along the *latter easterly* to the concession line between the 9th and 10th concessions; but that the cases did not decide that such owners had, and defendant contended that they had not, any private right of way over so much of the said road across 23 as was on the west half of that lot, where the obstructions were. And further they alleged, as was admitted, that in 1851 the Township Council passed a by-law closing the road across 23, and divesting it of its character of a highway; and that they had conveyed so much of it as was on the west half of 23 to defendant's father, under whom the defendant holds the west half of lot 23.

The learned Chief Justice entered a verdict for the plaintiff, with one shilling damages, reserving the whole matter for the consideration of the Court.

In Easter Term *Ewart* obtained a rule *nisi* to set aside the verdict entered for the plaintiff, and to enter a nonsuit or verdict for the defendant, pursuant to the leave reserved, and to the Law Reform Act, on the ground that the plaintiff shewed no title to a right of way over the west half of lot 23, in the 9th concession of Markham, the property of the defendant: that so much of the road across 23 as was situate on the west half of that lot, was closed by the Municipal by-law, dated 15th of July, 1851, and the soil and freehold thereof was afterwards, on the 11th of October, 1851, conveyed by the Municipality to the defendant: that there was no legal proof of any private way over the land of the defendant, and that said highway, where it crosses the east half of lot 23, is still open and uninterrupted.

In Trinity Term *J. H. Cameron*, Q.C., shewed cause. The cases of *Johnson v. Boyle*, as reported, 8 U.C. R. 142, and again in 11 U. C. R. 101, were put in evidence at the last trial, and prove a right in the plaintiff over the whole road across lot 23 from east to west, and they are not rebutted. The defendant is, therefore, estopped from denying the plaintiff's right, and he must recover.

MacLennan, Q.C., contra. The cases of *Johnson v. Boyle*, as formerly reported, do not operate as estoppels, not being pleaded. However, they only establish a right of way across the east half of lot 23 to the concession line between lots 9 and 10, but do not establish any right of way over the west half of lot 23. This point is, therefore, still open, and the evidence given at the trial utterly failed to prove any such right of way.

GWYNNE, J., delivered the judgment of the Court.

The main question appears to be whether or not the recoveries in the former actions establish a right of way to

the owners for the time being of the piece of land of which the plaintiff is in possession, over the west half of lot 23, to the concession line between the 8th and 9th concessions, and whether the defendant is affected by those recoveries.

By the report of *Johnson v. Boyle*, in 8 U. C. R. 142, and which we are to take as evidence given in this case of the facts therein recited, it appears that the plaintiff in that action, under whom, by derivative title, the present plaintiff claims, declared against one Boyle, the defendant therein: "that before and on the 1st of January, 1843, there of right was, and from thence hath been and still ought to be a *common public highway* in and through a close in the township of Markham, *leading from* a certain highway, being *the concession road between the ninth and tenth concessions of Markham, through lot No. 23 of the said ninth concession*, to a certain other highway, being the concession road between the *eighth and ninth* concessions of Markham: that the plaintiff was lawfully possessed of a certain close near to the said highway leading from the said concession road between the eighth and ninth concessions, and had no other means of access with his carriages, &c., to and from his close in and to the said concession roads, except through the said public highway leading from and to the said road between the 8th and 9th concessions of the said township; yet the defendant, well knowing, &c., obstructed the said highway by putting rails, " &c.," and continued the said obstruction from thence hitherto, by which the plaintiff has been prevented from using and going along the public highway, so leading as aforesaid, and has been obliged to pass and repass to and from his said close into the said concession roads between the ninth and tenth concessions and the eighth and ninth concessions of the said townships, by a very circuitous route.

In a second count the plaintiff declared, "that before and at the time, &c., he was and still is lawfully possessed of a certain other close, *and that by reason thereof* he, during all the time aforesaid, had and still of right ought to have a certain way from his said close *towards* a certain close in

the township aforesaid, and into, through, and over the same towards a certain common and public highway in the township aforesaid, and into the same, and from thence towards the close of the plaintiff, and unto and into the same, for himself, his servants, horses, carriages, &c.; yet, that the defendant well knowing, &c., on the 1st of January, 1843, and on divers days," &c., "wrongfully stopped up the said way to the plaintiff's damage, &c."

The defendant, in that action, pleaded: 1. Not guilty; 2. Traversing the right of way over lot 23 in the first count mentioned, on the alleged road leading from the concession line between the 9th and 10th concessions to the concession line between the 8th and 9th concessions *at the place where* the defendant erected the obstructions; and 3. Traversing the plaintiff's alleged right of way, stated in the second count.

The piece of land of which the plaintiff Johnson in that case had possession, was the same west half of the east half of lot 24, in the 9th concession of Markham, now in possession of the plaintiff Walsh.

What was claimed in the first count of the declaration in *Johnson v. Boyle*, as above reported, was a peculiar injury to the plaintiff over and above that borne by others of Her Majesty's subjects, by the obstruction of a common public highway, which the road across lot 23, from the concession lines at either end of the 9th concession, was claimed to be. And the right of way claimed in the second count was from that public highway so crossing lot 23, over that portion of lot 23 lying between it and the west half of the east half of lot 24. And the issue as to the first count was whether or not the plaintiff had any *peculiar right* over the road across lot 23, *at the place* where the evidence should disclose that it was obstructed.

It is recited in that case, which in so far as it is material we are to take as evidence given in the case before us, that the father of Boyle, the defendant therein, was originally the proprietor of the whole lot 23 in the 9th concession of Markham: that many years previously, but when is not

stated, *he sold to one Matthew Mills the west half of the lot.* It is further recited that George Boyle's son, the then defendant, obtained from his father the east half of the same lot 23, except that within the east half, some distance west of the 10th concession line, his father, George Boyle, gave to the public one acre of land for a burying ground. This piece of land reserved for a burying ground, and which was excepted in the deed from George Boyle to his son, fronted upon a road through the centre of lot 23 in the 9th concession from the 10th to the 9th concession lines, which road had been generally used by all persons who desired to use it for any purpose so long ago as 1805, *having been in the first instance laid out by the assent of Mills, the proprietor of the west half, and of George Boyle, father of the then defendant, proprietor of the east half of lot 23.* It is also recited that the defendant in that case was the owner of the *east end* of 24, in the 9th concession. The point in dispute is thus stated to have been : that "the defendant thus owning land to the east and south of the plaintiff it was impossible for the plaintiff to get to the 10th concession line, either through lot 24 or 23, without trespassing on the defendant, unless he could make out that he had a private right of way, such as he declared he had, leading from his house to the road running through lot 23, and leading from the 9th to the 10th concession; *and unless* he could make out that that road, *where it led past the burying ground to the 10th concession,* was a common public highway, which neither the defendant nor any other person could legally shut up." The report proceeds to say that "he gave evidence to shew that the road through the centre of 23, from the 9th to the 10th concession, was a legal highway—first, because it was expressly dedicated to the public as such by George Boyle, when he was the owner in fee; secondly, because from the long user a dedication might be presumed, if it were not clearly proved."

I understand this part of the report to relate to that portion of the road in which the obstruction complained of

in the first count was, that is to say, between the burial ground, which was on the east half of lot 23, and the concession line between the 9th and 10th concessions; for in a previous part of the report it had been stated that the road in question had been, "*in the first instance, laid out by the assent of Mills, the proprietor of the west half, and of George Boyle, the proprietor of the east half.*"

The jury rendered a general verdict for the plaintiff, and one shilling damages.

Upon this verdict being moved against, the Court of Queen's Bench sustained it.

Robinson, C.J., delivering the judgment of the Court, says: "Upon full consideration of the evidence given in this case, we are all satisfied with the verdict. If the plaintiff shewed a right to recover in respect to the obstruction of either of the ways in question, it would be enough—for the jury gave but nominal damages." He then goes on to shew that there was abundance of evidence to establish that the road across lot 23 in the 9th concession from west to east, between the 8th and 10th concessions, was a common public highway; and it was in respect of an obstruction of the plaintiff's right of way over this highway, at some point between the burial ground and the concession line between the 9th and 10th concessions, that the Court was of opinion that the plaintiff's cause of action was most clearly established; for, with reference to the right of way claimed in the second count, the judgment proceeds: "As to the private way, leading from Johnson's house to this highway between the 9th and 10th concessions, very little is said respecting that by the witnesses, but I do not see that we could properly find fault with the verdict as regards that alleged private right of way; and, at any rate, the damages given being nominal, *and the plaintiff's right to recover in respect to the obstruction of the other way being, as we think, established*, we should not set aside the verdict on account of any doubt we might have respecting the right to recover on the second count."

I confess I have been unable to understand this portion of the judgment, for I fail to see what *peculiar right* the

plaintiff Johnson could have had giving to him a *cause of action* for the obstruction of a common public highway, unless it was through the right of way which was claimed in the second count, as being *his only access* over the highway in question to the concession line. If he had not this private right of way to the road, which was claimed to be a common public highway across lot 23, I do not well see what right he could have had to that road as distinct from other members of the public, which could give him a *cause of action* for its obstruction. Nor do I see why the smallness of the damages could affect the defendant's right to a new trial, if that private way, claimed in the second count, was not clearly established, when what was claimed in the action was a right to make the east half of lot 23 subservient during all time to the west 50 acres of the east half of lot 24.

The judgment thus concludes: "It was fairly left to the jury, upon the evidence, to find whether there had been an actual enjoyment of a *private right of way* from the plaintiff's house through the defendant's land to the public way on lot 23, leading from that lot to the 10th concession; the jury found there had been such enjoyment for more than twenty years; and there was such evidence, we think, as warranted them in so finding."

Now the point decided in that case was that the plaintiff therein, Cornelius Johnson, had, as against Boyle the defendant therein, a private right of way from the west half of the east half of lot 24, in the 9th concession of Markham, over a portion of the east half of lot 23 in the same concession to a certain road extending across lot 23 from east to west, which the case determined to be a common public highway: and further, that the plaintiff had such a private interest in so much of that common highway as was situated in the east half of the said lot 23 from the private way above mentioned to the concession line between the 9th and 10th concessions, as gave him a *cause of action* for obstruction of the highway, and that decision is no doubt binding when properly relied upon, as between

the parties to that action and their privies in estate. But what is not expressly decided by that case remains open between all parties affected or unaffected by the judgment.

We are referred to the report for the purpose of extracting therefrom the facts upon which it proceeded, and to take as evidence, so far as may be material to the case before us, what is recited as to title and facts proved in that case. For *this purpose* I must confess that the report does not appear to me to be of much value.

So far as relates to the private way from the west half of the east half of lot 24 to the common public highway extending from east to west across lot 23, it may be admitted that it has been established conclusively, but with that we have nothing to do in the case before us. The plaintiff's right there is not now disputed. The place where the plaintiff's right of way is contested in the case before us, is upon so much of the road extending across lot 23 as is situate upon the west half of the said lot 23; and in so far as such road there is concerned, I do not see that the case in 8 U. C. R. decides anything further than that it had become a common public highway. But the report is utterly defective in omitting to state any portion of the evidence upon which the plaintiff's *particular* interest in that highway was rested, so as to give to *him* a *private remedy* by action instead of the public remedy by indictment for the obstruction of a public or common highway.

Reading the first count in that case the plaintiff's right would seem to have been rested upon a right of way by necessity from his west half of the east half of lot 24, along the road situate on lot 23 to the concession roads abutting on either end of the 9th concession. But there is nothing stated in the report from which we can gather what was the evidence or what were the grounds upon which a way of necessity was claimed for a part of lot 24 to the concession roads in front and rear of that lot over lot 23, instead of over the other parts of lot 24 itself. That there was abundance of evidence to support the verdict in that case, which established the right of way from lot 24 to the road

across lot 22, and thence easterly along that road to the 10th concession line, we are bound to assume from the judgment; but when we are referred to that case, as reported, for evidence in support of a similar right across the west half of lot 23, it is necessary that we should clearly see upon what evidence the former case proceeded, and whether that evidence is sufficient to establish the right of the plaintiff in this action to a peculiar right, giving him a cause of action for the obstruction of the same common highway where it crosses the west half of lot 23.

As an estoppel it appears to me to be clear that, inasmuch as what is decided in the former case affected wholly the east half of 23, the judgment therein could not conclude the point in issue in this cause, even if it had been pleaded, which it has not been.

The case of *Johnson v. Boyle*, as reported in 11 U. C. R. 101, affords us no assistance, as no evidence whatever is recited in it; the points arising there being points of pleading brought before the Court on demurrer. There the declaration claimed in general terms a certain way, *by reason of plaintiff's possession of a close* in the Township of Markham, from the said close towards a certain other close in the said township, and into, through, and over the same towards a certain common and public highway in the township aforesaid, and into the same, and so back again from the said common public highway towards the said close, and into, through, and over the same, and from thence towards and into the plaintiff's said close. The defendant pleaded in substance that the supposed way was a common public highway passing across lot 23, in the 9th concession of Markham: that the defendant was seized of the east half of lot 23, and one Johnson, (not the plaintiff in the action), was seized of the west half, and that the township by by-law had stopped up the highway, and had conveyed so much of it as was on the east half to the defendant Boyle, and so much as was on the west half to the said Johnson, the owner in fee of the west half. This plea was demurred to *as an argumenta-*

tive denial of the right of way claimed, and as an informal attempt to justify the obstruction of plaintiff's *private right* by a by-law authorizing the stopping up of a public highway. The Court sustained the demurrer, for the reason that all that was contained in the plea might be true, and that yet the plaintiff's right, *if he had such a one*, would not be affected by it. The other point decided arose on an estoppel pleaded, setting up the whole of the record and judgment in the former action, and alleging that the place, where the obstruction complained of was, was the same piece of land as described in the second count of the former action.

As to that piece of land no question arises in the case before us.

It remains to be considered, whether the evidence taken in the case before us, either separately or in connection with what is reported in 8 U. C. R. 142, is sufficient to sustain the plaintiff's action.

The whole evidence, so far as we know from the evidence before us or can collect from the reported case, and therefore the only evidence upon which we can proceed, appears to be that at some time prior to 1805, and while one Matthew Mills was seized of the west half, and while one George Boyle, the father of the defendant in *Johnson v. Boyle*, was seized of the east half of lot 23, in the 9th concession of Markham, they, Mills and George Boyle, laid out a road upon and across lot 23, from the concession line between the 9th and 10th concessions to that between the 8th and 9th concessions, which road upon the first day of January, 1843, at least had acquired the character of a common public highway. While seized of the east half of lot 23, but when does not precisely appear, but at any rate fully 16 or 17 years before 1851, that is to say, prior to 1834 or 1835, George Boyle gave an acre of the east half of lot 23, fronting on the road across the lot, to the public for a burying ground, and this piece he excepted from his grant in the deed which he gave to his son of the east half. Peter Johnson, the father of Cornelius Johnson, the plaintiff in

Johnson v. Boyle, acquired the west 50 acres of the east half of lot 24, but when first he acquired that piece of land does not appear, nor from whom he acquired it. There is no evidence before us that it was ever owned by any one who at the same time was seized of any part of lot 23. While Peter Johnson, the father of the plaintiff in *Johnson v. Boyle*, was seized of the west 50 acres of the east half of lot 24, John Johnson, Peter's brother, was possessed of the east 50 acres of the same lot. Prior to the commencement of the action in *Johnson v. Boyle*, Boyle, the defendant therein, had acquired the same east 50 acres, which by the evidence given now in this action by Johnson, the plaintiff in the former actions, appeared to have been once the property of his uncle John.

There is no evidence, which we can anywhere see, that connects the title to any part of the east half of lot 24 with the owner of any part of lot 23, at the time that Peter Johnson first acquired the west 50 acres of the east half of lot 24, so as to give the owner of such 50 acres any claim to any right of way over lot 23, in virtue of the mode in which the title to such 50 acres in lot 24 was acquired.

Nor is there any evidence whatever from which we can infer in law that any part of lot 23 became a servient tenement to the west half of the east half of lot 24, which would give to the owner of the last mentioned piece of land a way of necessity over lot 23.

We gather from the evidence now given in the case before us by Cornelius Johnson, the plaintiff in the former actions, that the right of way claimed by him in the former action from lot 24 to the common highway crossing lot 23, did not originate in a way of necessity nor in any privity of title between his title to the 50 acres on 24 and the title of any former owner of lot 23, but in a gift which by long use has matured into a perfect right. He says: "The short road north to south was given to my father, (Peter), by George Boyle, father of John Boyle," which latter was the defendant in the former actions.

I collect from the evidence that this gift was long after

the first laying out of the road across lot 23, and not before 1812; for Cornelius Johnson, who testifies to the fact of this way having been given by George Boyle to Peter Johnson, father of the plaintiff in *Johnson v. Boyle*, says that he came into the Township of Markham to lot 24 in 1812.

It appears then sufficiently plain that at the time that the owners of the west 50 acres of the east half of lot 24 first obtained any way at all to the highway crossing lot 23, the west half of that lot was the property of another person, who does not appear to be in any way in privity with George Boyle, so as to be affected in any manner by the right of way granted by him; for although the present defendant traces the title for the west half back to George Boyle, it must be through Matthew Mills, who had purchased from him the west half of lot 23, prior to 1805, and before the highway across lot 23 was laid out or opened.

In so far, therefore, as the west half of lot 23 is concerned, I can see no interest that the plaintiff can have by reason of his being now the owner of the west 50 acres of the east half of lot 24, which could deprive the owner of the west half of lot 23 of the right to acquire so much of the old highway as passed through that half, when it was, as it appears to have been, divested of its character as a highway by a by-law of the municipal council in 1851.

The former decisions establish, no doubt, the right in the owners of such west 50 acres over and upon the east half of lot 23; but neither in the former cases, as reported, nor in the case before us, do I see anything which would warrant us in holding that the plaintiff here has established any right of way over the west half of that lot.

In my judgment, therefore, the plaintiff should be nonsuited. If he can make out a better case than is at present disclosed, he can have the opportunity of raising the question again.

Rule absolute.

THE CANADA CAR AND MANUFACTURING COMPANY V.
HARRIS.

*Joint stock company by letters patent—Subsequent incorporation by statute—
Liability of shareholders.*

To an action for calls alleged to be due by defendant to the Canada Car and Manufacturing Company, defendant pleaded on equitable grounds, that he subscribed for the shares and became a shareholder in a Company, called "The Canada Car Company," incorporated by letters patent for certain specified purposes, and not otherwise: that afterwards, and without the assent and against the will of defendant, that Company applied to the Dominion Legislature and obtained an Act constituting the shareholders therein a body corporate, under the name of the Canada Car and Manufacturing Company, the now plaintiffs: that by the said Act greater powers were conferred upon the plaintiffs than were possessed by the Canada Car Company, and the nature of the business was varied and extended, and the undertaking rendered more hazardous than was contemplated by the Canada Car Company, or the defendant when he became a shareholder thereof; and that the defendant never agreed to become a shareholder of or invest his money in a Company possessing the powers of the plaintiffs, whereby defendant is relieved from liability.

Held, plea clearly bad; for the Act was binding on all the shareholders, whether assenting or not to the application for it; and this Court had no jurisdiction to relieve defendant from a liability which the statute expressly declared that he should continue to be subject to.

DECLARATION: that the defendant is a holder of fifty shares in the Canada Car and Manufacturing Company, and is as such shareholder indebted to the said Company in the sum of \$2,100, in respect of fourteen calls of \$6, upon each of twenty-five shares, parcel of the said fifty shares; and that the said defendant is also indebted to the said Company in the sum of \$2,350, in respect of fourteen calls of \$6 each, and one call of \$10, upon each of twenty-five shares, the balance of the said fifty shares so held by the defendant as aforesaid in the said Company, whereby an action hath accrued to the said Company, under The Canada Joint Stock Companies' Clauses Act, 1869, to demand and have of and from the defendant the sum of \$4,450, yet the defendant has not paid the same.

Third plea, on equitable grounds: that the defendant subscribed for and became the holder of certain shares in a Company, called the "Canada Car Company," incorporated under the provisions of the Canada Joint Stock Companies'

Letters Patent Act, 1869; and the shares in the declaration mentioned were and are the shares subscribed for by the defendant in the said Company and not otherwise: that the Charter or Patent of Incorporation of the said Canada Car Company empowered the said Company to make, construct, lease, or sell railway cars and railway points; and the defendant subscribed for the said shares, and became such shareholder in the said Company, incorporated for such purposes and objects, and not otherwise: that afterwards, and without the assent and against the will of the defendant, the said Canada Car Company applied to the Legislature of the Dominion of Canada, and obtained a special Act to be passed by such Legislature constituting the shareholders of the Canada Car Company a body politic and corporate, under the name of the "Canada Car and Manufacturing Company," who are the now plaintiffs: that by the said Act greater and more extensive powers were and are conferred upon the said plaintiffs than were possessed by the said Canada Car Company under their said Charter of Incorporation, and the nature of the business which the plaintiffs might and were authorized by the said special Act to carry on was varied and extended, and the plaintiffs were authorized to engage in and become parties to other and more hazardous undertakings, not in contemplation of the said Canada Car Company when the same was incorporated or of the defendant when he became a shareholder thereof; and the defendant never agreed to become a shareholder in a Company possessing the powers now possessed by the plaintiff, or invest his money and means in undertakings which the said plaintiffs are authorized by the said special Act to engage in and carry on—whereby the defendant is in equity discharged from future liability in respect of his said subscription.

To this plea the plaintiffs demurred, on the grounds: that the said plea does not show that the defendant repudiated the said stock or refused to hold it after the passing of the said Act, or that he received no benefit from it, or that he did not continue and act as a shareholder

in the said Canada Car and Manufacturing Company ; and the defendant admits that by the said Act, which is a public Act, the shareholders of the said Canada Car Company did become the shareholders of the said Canada Car and Manufacturing Company.

J. H. Cameron, Q. C., and *W. H. Lockhart Gordon*, for the demurrer, cited : *Ware v. Grand Junction Waterworks Co.*, 2 Rus. & My. 470; *Stevens v. South Devon R. W. Co.* 13 Beav. 48; *Bill v. Sierra Nevada Lake Water and Mining Co.*, 6 Jur. N. S. 184; *Waterford, &c., R. W. Co. v. Logan*, 14 Q. B. C. 672; *Deposit and General Life Assurance Co. v. Ayscough*, 6 E. & B. 761; *Lindley on Partnership*, 3rd ed., vol. 1, page 116; *Kidwelly Canal Co. v. Raby*, 2 Price 93; *Spackman v. Lattimore*, 3 Giff. 17.

F. Osler, contra, cited : *Proprietors of Union Locks and Canals v. Towne*, 1 New Hamp. 44; *Middlesex Turnpike Corporation v. Locke*, 8 Mass. 267; *Hartford and New Haven R. W. Co. v. Croswell*, 5 Hill N. Y. 385; *Lindley on Partnership*, 3rd ed., vol. 1., page 117; *Tredwen v. Bourne*, 6 M. & W. 461; *Peel v. Thomas*, 15 C. B. 714.

GWYNNE, J. (*a.*)—Some American cases were cited before me by the defendant's counsel, which support his contention, and several English cases by the plaintiffs' counsel, which shew that the law, as it affects the point in issue here, as it is administered in England, is quite different from that administered in those Courts in the United States wherein the cases cited were determined.

I have no hesitation in deciding that I have no jurisdiction, either at law or in equity, which would warrant me in holding that the defendant is relieved from a liability which an Act of Parliament declares expressly that he shall continue to be subjected to.

The proper Court in which to have raised the points argued before me was the Court of Parliament of the Dominion, in which the Act complained of was passed.

(a) Argued during term, before GWYNNE, J., alone.

That it was competent for the shareholders in the original Company to apply to the Legislature for the extended powers, and that the Act of Parliament granting such extended powers is binding upon all the shareholders, whether assenting or not to the application to the Legislature for the Act granting such powers to the extent that the Legislature says they shall be bound, is too well established by English law to admit of a doubt.

Judgment, therefore, will be for the plaintiffs on the demurrer.

Judgment for plaintiffs.

CASSIDY V. MANSFIELD.

Notice of dishonor—Sufficiency of.

Where a note fell due on the 25th of July, 1873, on which day it was duly presented for payment and protested, but the notice of protest, dated on the 26th, incorrectly stated that the note was this day presented and protested.

Held, that the notice was sufficient, as it did not appear that the endorser was misled by the mistake.

THIS was an action on a promissory note, made by one Lord in favour of the defendant, and endorsed by him to the plaintiff.

The cause was tried before Galt, J., without a jury, at Ottawa, at the Spring Assizes of 1874

The evidence was, that the note fell due on the 25th July, 1873, on which day it was duly presented, and protested for non-payment. The notice of protest was dated the 26th July, and was as follows :

“ OTTAWA, 26th July.

“ SIR,—

“ Take notice that a promissory note, dated on the 22nd February, 1873, for the sum of \$421.08, made by H. Lord, payable five months after the date thereof, to the order of yourself, at the Merchants Bank of Canada here, and

endorsed by you and John L. Cassidy & Co., was this day presented by me for payment at the office of the said Bank in Ottawa, and that payment thereof was refused ; and that the Merchants Bank of Canada, the holders of the said note, look to you for payment thereof. Also, take notice that the same note was this day protested by me for non-payment."

The notice was signed by the notary.

It was admitted that the notice was sent in proper time, but Mr. Osler, for the defendant, contended that the statement in the notice, that the note had been presented on *this* day was a fatal objection to its sufficiency, the notice being dated on the 26th, while the note fell due on the 25th.

The learned Judge considered the notice sufficient, and entered a verdict for the plaintiff.

In Easter term *F. Osler* obtained a rule *nisi* to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendant, pursuant to the Law Reform Act, on the ground that there was no evidence, or no sufficient evidence, of due presentment and notice of dishonour of the note.

In Trinity term *Beaty*, Q. C., shewed cause. It is admitted by the defendant that the note was duly presented for payment, and protested, and that the notice of protest was sent in proper time. The notice contained all the information necessary to shew the defendant that the note was dishonoured, and was sufficient in all respects, except in stating the presentment to have been on the 26th instead of the 25th ; and the question therefore is, whether the fact of the notice stating the presentment to have been on the latter date vitiates it. The cases shew that the misdescription must be of such a character as to mislead, and so long as it does not do so it is immaterial, and the defendant here clearly was not misled. The notice is therefore sufficient. In *Thorn v. Sandford*, 6 C. P. 462, where the notice stated incorrectly

the day on which the note fell due, it was held, that as it was not shewn that there was any other similar note falling due on the same day, and that the defendant was not misled by it, the notice was sufficient. See also *Blain v. Oliphant*, 9 U. C. R. 473; *Wood v. Hutt*, 9 U. C. R. 344; *Harris v. Perry*, 8 C. P. 407; *Blinn v. Dixon*, 5 U. C. R. 580; *East v. Smith*, 16 L. J. Q. B. 292; *Byles on Bills*, 11th ed., 271-6. In *Smith v. Whiting*, 12 Mass. 5, where the notice was given at the proper time, but described the note as due three days before, it was held sufficient.

F. Osler, contra. It is quite clear that the endorser is discharged, unless the note be duly presented and due notice of presentment given, and the notice shews that there never was a due presentment, as it states it to have been presented on the 26th, the day after it became due, which of course would be too late. The notice, therefore, on the face of it, shews that the presentment was bad, and the endorser, on receiving it, is notified of his discharge. No doubt the cases shew that a misdescription which does not mislead is immaterial; but here the plaintiff was clearly misled, as the notice, in fact, informed him that he was discharged. There are no English cases upon the point, but the American cases are express. In *Ransom v. Mack*, 2 Hill, N. Y., 587, the notice was held invalid, and the endorser discharged, and a previous case of *Ontario Bank v. Petrie*, 3 Wendell 457, the other way was overruled. And *Ransom v. Mack* has been followed in the subsequent case of *Wynn v. Alden*, 4 Denio 163. See also *Bank of Alexandria v. Swann*, 9 Peters 46; *Story on Bills of Exchange*, 4th ed., p. 475, sec. 390.

GALT, J.—I regret to say that I have been unable to find any case in England where this point has arisen. There are very numerous cases in which it has been held that a misdescription of the bill, which does not mislead, is immaterial, and the law is now stated to be so in the last edition of *Byles on Bills*, 11th ed., 276, also in *Chitty on Bills*, 10th

ed., 299 ; and the case of *Bromage v. Vaughan*, 9 Q. B. 608, is relied on as having so settled the question. But in the case now before us there was no misdescription of the note, but the notice, on the face of it, shewed a presentment on the day after the note fell due.

There is an express authority, in the Supreme Court of the State of New York, *Ransom v. Mack*, 2 Hill, N. Y., 587, to the effect that a mistake such as has occurred here is fatal. The action was against the defendant as first endorser on a promissory note. The note was dated on the 1st April, 1840, and fell due on the 4th July (which was a public holiday). The notary demanded payment at the Bank on the *third* of July, and on the same day put a notice in the post-office directed to the defendant, stating, among other things, that payment of the note had been *that* day demanded. Being told by the cashier that it was the custom of the Bank to protest notes on the *fourth* of July, the notary again demanded payment on the fourth, and went to the post-office, and took out the notice he had given on the third, altered the date to the fourth, and again deposited it in the post-office. There were several objections raised as to the service of the notice, which it is unnecessary to consider ; but as to the objection that the notice was of a demand on the 4th July, when a demand could not properly be made, the Judge left it to the jury to say whether the defendant had been misled by the notice, which stated a demand on the fourth, when it should have been the third, and he instructed the jury that the notice was sufficient if the defendant had not been misled. The jury found a verdict for the plaintiff, and the defendant moved for a new trial.

Bronson, J., in giving judgment on this part of the case, after going at considerable length through the facts of the case, says, at page 593, " Assuming, as we must, that he " (the endorser) " knew the law when he read the notice, he had a right to say—' The presentment was not made at the proper time, and I am consequently under no liability to the holder. I am not legally called upon to take up the paper,

and need not trouble myself about looking to the prior parties for an indemnity.' * * No particular form of words is necessary in giving notice to the drawer or endorser." After citing several cases, both English and American, he proceeds: "In the case at bar, the notice was more defective than though it had wholly omitted to state a presentment at the Bank where the note was made payable; for, although the defendant was informed that a demand had been made, he was also informed it was made on the wrong day. If the notice had been that the note was duly presented, or if nothing had been said about presentment, the defendant might have inferred that a demand had been made at a proper time. But he was told that the holder relied on a demand which was utterly void; and instead of taking up the note and looking to the maker, he had a right to consider himself discharged."

The circumstances in the foregoing case were as strong in favour of the plaintiff as in the one now before us. A due presentment had been made, but the notary, erroneously supposing that the presentment was too soon, made a second presentment, and the notice sent to the defendant stated the presentment to have been on the 4th in place of on the 3d, as the notice here was of presentment on the 26th instead of the 25th.

Although, as I have already stated, I have not found any English case in which the question turned on a mistake as to the day when presentment was said to have been made, there is one in our own Court of Queen's Bench which appears to be directly opposed to the case of *Ransom v. Mack*. That is the case of *Blinn v. Dixon*, 5 U. C. R. 580.

As this is fully commented on by the Chief Justice in his judgment, it is unnecessary for me to do more than to state, that until the doctrine laid down therein is overruled by a Court of Appeal, I think we should follow it, and hold that the notice in this case was sufficient.

I may also remark, that in other American authorities cited by the Chief Justice, the decision in *Ransom v. Mack* has been questioned.

HAGARTY, C. J.—In *Bromage v. Vaughan*, 9 Q. B. 608, a bill of exchange was accepted, payable at the London Joint Stock Bank in London. Presentment was averred there. The plea denied notice. At the trial the notice of dishonour described the bill as payable at “The London and Westminster Bank.” It does not appear from the statement, if the notice, in addition to describing it as payable at the wrong Bank, spoke of presentment having been made there.

Lord Denman says : “The notice described the bill correctly as to dates and amounts and parties, but stated it to be made payable at the *London and Westminster Bank*, whereas it was made payable at the *London Joint Stock Bank*. If a misdescription is not considered such as would mislead the defendant in respect of the bill intended, the notice is not vitiated thereby,” citing *Stockman v. Parr*, 11 M. & W. 809. “Upon that principle we are of opinion that the notice in this case is valid, notwithstanding the mistake. The Lord Chief Justice informs us that there was no evidence that the defendant had been misled.”

If the notice had stated a presentment at a wrong Bank, I think it would be impossible to distinguish the case from that of the statement of presentment on a wrong day. If the statement were true in either case, and no other presentment could be proved, the endorser would be discharged.

The question before us is this : There is a good presentment on the proper day, but the notice mentions an improper day. It is certain that it was wholly unnecessary to insert in the notice either the time or the place of presentment. Does, therefore, the unnecessary mention of a wrong day prevent the plaintiff from proving that it was made on the right day ?

It is clear that if the presentment had been made on the 25th, it would not have done any harm to present it again on the 26th.

It must all turn on the proposition that telling the endorser that it was presented on the 26th, necessarily

gives him to understand that it was not presented in proper time, as the law requires, and that therefore he has not merely the right to consider himself discharged, but that in fact he is discharged.

He is entitled to be informed, with reasonable clearness, that the instrument which he endorsed has been dishonoured by the person standing towards him as the principal debtor.

As soon as the Courts have established that a mistake in describing the instrument does not necessarily vitiate the notice, it seems hard to see where any hard and fast line can be drawn.

Notifying a man, who had put his name on a bill of exchange as drawer for £53, that there was "due on your dishonoured note, dated 19th December last, £53 6s. 6d.," the noting charges being 6s. 6., was held sufficient in *Stockman v. Parr*, 11 M. & W. 809, Parke, B., holding there was sufficient evidence of identity to go to the jury.

There the drawer might have said, on receiving the notice, that he knew he had never made a note, and might have acted as if he were under no liability. But he would have done so at his peril.

So a mistake in the name of the acceptor or drawer, or in the amount or date, or transposing the names of drawer and acceptor, does not necessarily vitiate, unless the defendant is misled, which is a question of fact: *Byles on Bills*, 272.

But it is urged here that this is no question of identity; that it is a misstatement of a material fact in dealing with the note.

Blinn v. Dixon, 5 U. C. R. 580, was an action against defendant as endorser of a note. The pleas denied presentment and notice.

The notice was dated London, November 22, 1846, and stated "that the promissory note of Peter Browne for £20, at three months, from the 19th of August, 1846, on which you are endorser, is due this day unpaid. I therefore give you notice, that as the holder of said note I look to you for payment thereof.

"WARREN BLINN."

The note was "payable to defendant," or order, at the office of Warren Blinn, Esq., in London.

The 22nd November, the date of the notice, was a Sunday, and it was objected, that alleging the note was due that day was fatal to the plaintiff. It was also objected that the notice was bad, for not stating presentment or dishonour.

Sir John B. Robinson says: "It is true, this notice says nothing of presentment, but it need not, because the note was made payable at the very place from whence the notice was sent, and where the maker had engaged to take it up. Its lying there unpaid was all that it was necessary to state, for though the holder was not bound to present it there, but might have presented it to the maker in person anywhere, yet the maker having named that as the place where he undertook to meet the note, it was unnecessary to go in search of him elsewhere for the purpose of presenting it. As to the notice being dated on a Sunday, that cannot signify, for it was given on Monday, which was in due course, the note having fallen due on the preceding Saturday, the days of grace expiring on the Sunday."

As the law then stood the note matured on Saturday, and should have been met that day.

If the note had been first brought to and left at Warren Blinn's office on the Sunday, and had not been in fact lying there on the Saturday, could the plaintiff have succeeded?

If not, then the notice merely says, the note is due *this day*, unpaid.

As I understand it, the Court held it sufficient to shew that the note lay for payment at the place of payment on the day of maturity. They refer to *Bank of Upper Canada v. Street*, 3 U. C. R. 29.

To say, on Sunday, that the note is due this day, unpaid, is not inconsistent with its being actually there on the preceding day, when the maker ought to have paid it.

Therefore, in the case before us, notwithstanding the statement in the notice that it was presented and dis-

honoured on the 26th, may it not be shewn that it was also presented and dishonoured on the 25th?

The authority relied on for the defendant is, the New York case of *Ransom v. Mack*, 2 Hill, N. Y., 587, cited by my brother Galt. This case was decided in 1842, and overrules a decision the other way in the same Court, of *Ontario Bank v. Petrie*, 3 Wendell 457.

The Court says, in *Ransom v. Mack*, at page 593: "Notwithstanding my own opinion, I should feel bound to follow the case of the *Ontario Bank v. Petrie*, if it had not been shaken by the recent decision of the Court for the corrections of errors, in *Remer v. Downer*, 23 Wendell 620."

On referring to the case in Error, 23 Wendell, and again, 25 Wendell 277, I find that the point decided was that the sufficiency of the notice, where the facts were admitted, were wholly for the Court, and the only "shaking" of *Ontario Bank v. Petrie* was, that in the latter case the judge left it to the jury to say whether the endorser was misled by the notice, which stated erroneously that the bill had been *last evening* protested for non-payment. The evening before was a day too soon.

In the overruling case of *Ransom v. Mack*, the notice stated it to have been a day too late.

The Court of Error at that time was the Senate of the State. The judgment is given by Chancellor Walworth, "seventeen members voting for reversal."

Senator Verplanck's judgment, given in 25 Wendell 278, concurs in the reversal on other grounds, and the reporter adds, that the question as to which tribunal is to decide on the sufficiency of the notice is still open.

In 1848, in the Supreme Court of Mississippi, in *Routh v. Robertson*, 11 *Smedes & Marshall* 392, a majority of the Court follow *Ransom v. Mack*, a dissentient Judge strongly objecting to it, and complaining that of late the Court in New York was paring away the law as it stood in the days of Kent and Spencer; and he adds, at page 393, "Whether the demand was made on the proper day, is a matter of evidence on the trial. If the notice state more, if it do not mislead the endorser, it may be regarded as surplusage."

This remark seems to me more in accordance with the spirit of English authority.

In 1850, *Tobey v. Lennig*, 14 Penn. 484, was before the Supreme Court of Pennsylvania. A note falling due on the 25th May was duly presented and dishonoured. On the same day the notary gave notice to the endorser that the note was that day presented, &c. But by mistake he dated the notice on the 26th, and as it read it would appear that the presentment was made on that day, and therefore too late. The Court held that the notice shewed the mistake on the face of it, for when it was handed to the endorser, the day of its date had not arrived; and at page 385 it is said, "He could, therefore, have been misled only by supineness in neglecting to ask for explanation. The effect of the mistake was misdescription of the note, and he knew whether he had negotiated any other. * * * If he doubted the identity of his endorsement, it was his business to have his doubt resolved."

If in that the notice, though left as it was at the endorser's place of business, had never in fact come to his knowledge till one or two days afterwards, would the decision have been different? I hardly think it turned exclusively on the fact that the endorser received it personally on the 25th."

Smith v. Whiting, 12 Mass. 5, (cited in *Chitty on Bills*), upheld as sufficient a notice given on the day the note fell due, though it described the note as due three days before.

This mistake would, as is contended here, mislead the defendant, and induce him to think he was discharged, if his note (of which he may not have kept a memorandum) was due some days before, and therefore the notice was too late.

It seems to me, on the whole, that if *Blinn v. Dixon*, in our own Court, be good law, we can uphold the recovery here against the endorser.

It is a matter of evidence whether this presentment was properly made or not. It is not necessary to notify the endorser how or when the presentment was made, and I

am not prepared to hold that a mistake in this matter of surplusage as to the time of presentment necessarily discharges him. The mistake on this unnecessary point of information did not, I think, of itself discharge the endorser.

I prefer leaving it to an appellate Court to decide for the first time in this country, that the right to recover is at an end.

GWYNNE, J.—It must be admitted that the case of *Ransom v. Mack*, 2 Hill, N. Y., 587, referred to by Mr. Osler, decided in the Supreme Court of the State of New York, is an authority that the notice of dishonour in the case before us is insufficient to charge the endorser; but, in the absence even of any authority in the English Courts, or in our own, I could not follow that decision, for its reasoning does not recommend itself to my judgment.

The argument upon which the judgment is based involves, in my opinion, a plain *petitio principii*. The judgment of the Court, as reported, opens with the assertion following: "Assuming, as we must, that the endorser knew the law when he read the notice, he had a right to say, 'The presentment was not made at the proper time, and I am consequently under no liability to the holder. I am not legally called upon to take up the paper, and need not trouble myself about looking to the prior parties for an indemnity.'"

Now, whether or not the endorser had a right so to treat the notice served upon him was the very point in judgment. An argument which is based upon the assumption of the point in debate does not recommend itself to my mind as entitled to much consideration. Proceeding upon such a mode of reasoning, the Court could not well have arrived at any other conclusion than it did. But the Court might, I think, with greater cogency, have argued that, assuming the endorser knew the law when he read the notice, he knew that whether the note was or not presented at the proper time was a matter of evidence to be

given at the trial, and that if the notice should, by mistake, state a wrong day, if such statement could not mislead, it might be rejected as surplusage, and that therefore the statement of a wrong day in the notice of dishonour, unless it misled the endorser to his prejudice, could not discharge him, if in fact the presentment should prove to have been made on the right day, and that notice of dishonour was given in due time.

The case which *Ransom v. Mack* overrules recommends itself to my judgment more than the overruling case; but I think that the case of *Blinn v. Dixon*, 5 U.C.R. 580, is an authority in support of the sufficiency of the notice.

Upon principle, independent of authority, I confess I should arrive at the same conclusion.

The note here was made payable at the Merchants Bank of Canada, at Ottawa, and the notice to the endorser sufficiently plainly conveys to him the information that that bank were the holders of the note at its maturity. The notice, however, adds that, the note was, this day, the 26th July, 1873, presented at the Bank for payment, the 25th being the day for presentment.

Now, consistently with the fact of presentment on the 26th, as stated in the notice, I see nothing which should exclude the holders at maturity, and the plaintiff here, as the last endorser, who, being liable to the holders at maturity, has taken up the note, from shewing that the note was in fact lying at the place where it was made payable, as the property of the Bank itself, on the 25th—within *The Bank of Upper Canada v. Street*, 3 U. C. R. 29—or that there was in fact a presentment on the 25th.

In order that the contention of the defendant should prevail, it would, as it seems to me, be necessary to hold that the form of the notice *estopped* the holders, upon whose behalf the notice was given, and all persons availing themselves of that notice, from proving the truth, namely, the fact of a presentment on the 25th.

I do not think that the notice can operate as such estoppel. We have it, therefore, proved that the note was in fact presented on the 25th, and dishonoured, and the notice sufficiently designating the note does give to the defendant the information that the holders, namely, the Bank, at whose office the note was payable, look to him for payment. All the requirements necessary to make the indorser liable concur.

Upon principle, therefore, as well as authority, we must give judgment in favour of of the plaintiff.

Rule discharged.

MAY V. SEVERS AND MYLES.

Landlord and tenant—Second distress for same rent—Goods delivered to be repaired—Construction of agreement.

D. was tenant to M. under a lease, which provided that in the event of D. making an assignment in insolvency the term should become forfeited and void, but that the then current quarter's rent, as well as the next succeeding current quarter's rent, should immediately become due and payable. On the 21st June, 1872, D. made an assignment in insolvency to K., an official assignee; and M. immediately distrained for the rent, including two quarter's due by virtue of the forfeiture. At the request of the official assignee, M. abandoned the distress, and in lieu thereof agreed to look to the insolvent estate, the assignee thinking that there would be abundance of property to pay it, but repudiating any interest in the term. Subsequently, the goods proving insufficient, by reason of a chattel mortgage, the assignee told M. that he could not continue responsible, and M. thereupon, on the 24th September, issued a second distress for same rent.

Held, that the second distress was bad, for on the abandonment of the first distress, which could not be said to have been at the request of the tenant, M.'s right to distrain was gone, and he could only look to the insolvent's goods, which passed, without the term, to the assignee.

Held, also, that the second distress could not be supported under the statute of Anne, as having been made within six months after the determination of the term.

An engine and boiler were left with D. by the plaintiff to be repaired, the repairs to be made in consideration of the use of the engine and boiler while in his possession. If a sale should be made within six months, D. to pay plaintiff \$400, and retain anything over as his commission. If not sold in six months plaintiff to be at liberty to retain the goods, D. to leave the same in repair, without charge, and to pay nothing for their use. *Held*, that D. acquired no beneficial interest until the repairs were made.

THIS was an action of replevin for certain goods, to wit, a portable engine and boiler, with some other goods distrained by the defendants.

The cause was tried before Hagarty, C. J., C. P., without a jury, at Toronto, at the Spring Assizes of 1874.

From the evidence given at the trial it appeared that by an indenture, bearing date the 15th August, 1872, the defendant Myles demised certain premises to one Thomas Dill for a term of five years, at a yearly rent of \$800, payable on the 15th days of November, February, May, and August. The lease contained a proviso, whereby it was declared that the demise was made upon the express condition, among others, that if the term thereby granted should be at any time seized or taken in execution or in

attachment by any creditor of the said lessee, or if the said lessee should make any assignment for the benefit of creditors, or becoming bankrupt or insolvent should take the benefit of any Act that might be in force for bankrupt or insolvent debtors, the then quarter's rent should immediately become due and payable, and the said term should immediately become forfeited and void, but that the next succeeding current quarter's rent should also, nevertheless, be at once due and payable. The premises were occupied by Dill for the purpose of carrying on therein his trade of a machinist.

During the term, and on the 22nd May, 1873, the plaintiff left with Dill a steam engine and boiler. The purpose for which they were left with him, was stated in an agreement signed by the parties at the time, as follows :—

“This agreement between Thomas Dill, of Toronto, and Isaac May, of Keswick, witnesseth, that the said May has delivered to the said Dill one portable engine and boiler for the purpose of repairing and selling the same, repairs to be made by Dill in consideration of the use of the said engine and boiler while in his possession. If a sale shall be made by said Dill within six months he is to pay said May \$400, and have the right to retain any balance of the purchase money as his commission. If the sale be not completed in six months, May to be at liberty to retake the said engine and boiler. Dill to leave the same in repair without charge. Dill in such case to pay nothing for use of same.”

On the 21st of June, 1873, Dill executed an assignment in insolvency under the Insolvent Act of 1869, to John Kerr, of the City of Toronto, official assignee. Immediately thereupon, and in virtue of the clause in the lease for the forfeiture of the term in the event of the lessee executing an assignment in insolvency, the defendant Myles placed a landlord's distress warrant in the hands of the defendant Severs, directing him to distrain the goods and chattels of Dill, the tenant on the premises, for the sum of \$600, for nine months' rent due. The sum thus claimed was made

up of \$200 for the rent due on the 15th of May ; \$200 for the quarter which was current when the assignment in insolvency was executed, and \$200 for the next succeeding quarter ; the two latter sums being claimed in virtue of the forfeiture created by the assignment in insolvency. Severs entered and distrained under this warrant, and while he was in possession, Kerr, the official assignee, thinking that there would be abundance of property to pay the rent, procured the defendant Myles to withdraw the distress, undertaking to pay him his rent, repudiating at the same time having any interest in the term.

It did not appear what goods had been seized under this distress warrant, but the plaintiff, it appeared, pointed out to the assignee this property as his, which the assignee did not include in or take as part of the estate of the insolvent. After the abandonment of the distress by the defendant Myles, a sale took place of certain property of the insolvent upon the premises demised, under a chattel mortgage, the amount realized being insufficient or barely sufficient to pay what was due under the chattel mortgage. The assignee informed Myles that he could no longer hold himself responsible for the rent which he had already undertaken to pay, and told him that he, Myles, had better take care of himself. Accordingly on the 24th September, Myles placed another distress warrant in the hands of Severs, directing him to "distrain for the sum of \$591,88, being the amount of rent due under the lease, dated 15th August, 1872." This amount was also, as the \$600 before had been, claimed for the same nine months' rent, in virtue of the clause for forfeiture contained in the lease in the event of the insolvency of the tenant. Severs entered upon the premises and distrained the engine and boiler of the plaintiff, which was still upon the premises, and in due course sold them, with the property which the plaintiff also claimed to be his, but which having been abandoned by the plaintiff, is not now under consideration.

At the trial, it was contended on behalf of the plaintiff :

1. That the defendant Myles having availed himself of the

clause for forfeiture contained in the lease, and having distrained for an amount which was only made due in virtue of the term being avoided, and having abandoned that distress at the request of the official assignee, who had no interest whatever in the term, it was not competent for the landlord to distrain again, as he did in September; and 2. That in any event the property of the plaintiff in question was exempt, it having come into the tenant's possession for repairs in the way of trade.

It was agreed that a verdict should be entered for the defendants, with leave reserved to the plaintiff to move to enter it for him, in which event the value of the engine and boiler was agreed to be \$300.

In Easter term *McCarthy*, Q.C., obtained a rule *nisi*, pursuant to the leave reserved.

In Trinity term *Maclennan*, Q.C., shewed cause. The plaintiff's first objection is that the goods were exempt from distress as being left with Dill in the way of trade to be repaired, but the agreement shews that apart from the repair of the goods Dill was to have a beneficial interest in them, and therefore they were liable to be distrained: *Findon v. McLaren*, 6 Q. B. 891; *Fenton v. Logan*, 9 Bing. 676; *Gorton v. Falkner*, 4 T. R. 565; *Wood v. Clarke*, 1 C. & J. 484. As to the second point, the distress was abandoned by Myles, the landlord, at the request of the official assignee, in whom all the lessee's goods vested by the assignment in insolvency; and, therefore, the request by the assignee was the same as by the lessee: *Bagge v. Mawby*, 8 Ex. 641; *Dawson v. Cropp*, 1 C. B. 961. The second distress is, however, good under the statute of Anne, as it took place within six months after the determination of the term.

McCarthy, Q.C., contra. It is quite clear from the agreement that Dill only had possession of the goods in the way of trade for the purpose of repairing them, and when repaired he was to have the use of them, and not until then, and therefore he had no beneficial interest in them, and

they were exempt: *Muspratt v. Gregory*, 1 M. & W. 633, 3 M. & W. 677; *Brown v. Shevill*, 2 Ad. & E. 138; *Woodfall's L. & T.*, 10th ed., p. 401. As to the second point, the evidence shews that the defendant Myles availed himself of the forfeiture in the lease and distrained for an amount which only became due by virtue of the forfeiture. The term therefore having ceased, it did not pass to the assignee, and he had no power to give a consent to the abandonment of the first distress: *Copeland v. Stephens*, 1 B. & Al. 593. The cases clearly shewed that a landlord cannot distrain twice for the same rent, unless the distress be withdrawn at the instance or request of the tenant: *Bagge v. Mawby*, 8 Ex. 641. *Woodfall's L. & T.*, 10th ed. 438, 774: The statute of Anne clearly does not apply so as to make the distress legal.

GWYNNE, J., delivered the judgment of the Court.

The true construction of the agreement under which Dill became possessed of the plaintiff's engine and boiler, appears to us to be that they were left for repairs to be made thereon by Dill in the way of his trade, with this agreement superadded, that upon being repaired, and in compensation for his work and labour expended in making the repairs, he should have the use of the engine and boiler until he should sell them for the plaintiff, provided always that such sale should take place within six months from the day that they were placed in Dill's hands for repair.

If Dill had made the repairs, he would be entitled to the possession of the repaired engine for his own use until sale, or until the expiration of the six months; but here the repairs never were made, so that Dill had acquired no beneficial interest in the articles.

It is however unnecessary for us to decide whether, in view of the fact that they were in Dill's possession for repairs, but under an agreement which, when the engine should be repaired, would give him a temporary beneficial interest in them, they were exempt from seizure altogether, because it appears to us that the plaintiff is entitled to

recover by reason of the distress made in September, and the sale thereunder.

Whether the engine and boiler had been seized or not under the distress in June, 1873, did not appear. If they were not, then the case is, that the landlord having acted upon the clause of forfeiture contained in the lease, and having distrained for an amount which included sums which only accrued due by virtue of the lease being in fact avoided, and having seized undoubted goods of the tenant himself; abundantly sufficient to satisfy the whole amount for which the distress was made, at the request of the official assignee, to whom the goods alone of the tenant, without the term, had passed, and, upon his promise to satisfy the rent out of the goods of the insolvent come to him, abandoned the distress.

This abandonment was made for the express purpose of enabling the assignee to deal with the insolvent estate, by selling it in the insolvency instead of permitting it to be sold under the distress warrant. An abandonment so arising constituted, as it appears to us, a good consideration for the assignee's promise to pay the amount of the distress out of the estate, although he had no interest whatever in the term; but it did not, (nor is there any pretence that it was contemplated that it should) operate at all as setting up again the forfeited term. But whether or not the engine or boiler were seized under the first distress matters not, as it seems to us.

That the first distress was made for moneys two-thirds of which became due only in virtue of the term having been actually avoided by the assignment in insolvency, is undisputed. The tenant himself could not have procured any abandonment of that distress, not only because the act of executing the assignment in insolvency had *ipso facto* put an end to the term, but because all his interest in the goods seized had passed to his assignee. The official assignee had no interest in the term, but only in the goods. It is clear that it was never contemplated that he should, as assignee, have any interest in the term. There is no

pretence that there was any intention upon the part of the landlord to abandon the forfeiture, if indeed the assignee was competent to enter into a contract which would have had the operation of doing away with the avoidance of the term declared by the lease as peremptorily to ensue upon the act of assignment in insolvency.

The plain intent of the assignee and of the landlord, on the latter agreeing to abandon the distress, was to enable the assignee to proceed to dispose of the estate in insolvency, instead of suffering a sale under the distress warrant, the assignee undertaking to protect the landlord's interest *out* of the estate in insolvency.

The manifest intent, as it appears to us, of this contract made with the assignee, to whom *all the goods* of the insolvent tenant had passed, exclusive of the term, was to abandon all right of *distress* against *all* the insolvent's goods, and to look to the estate in insolvency for the amount due to the landlord under the lease, whether for rent accrued before the assignment, or in the nature of a penalty by reason of the term being determined by the assignment.

The effect of this abandonment was to let in the chattel mortgage as a preferable claim, and this mortgage affected, as is admitted, every particle of what was the undoubted property of the insolvent on the premises, but it was believed, as the assignee stated, that the property was abundantly sufficient to satisfy the chattel mortgage, and, to leave a surplus to be dealt with in insolvency.

It was only upon the result of the sale under the chattel mortgage becoming known, that this belief was proved to be unfounded. The landlord was a party consenting to this sale. He had in effect surrendered his distress in favor of the chattel mortgage, which swept away almost *the* whole of the insolvent's chattels, which had been on the premises.

To hold under these circumstances that the assignee represented the tenant, and that he was as such dealing with the landlord in the sense of procuring the distress to be abandoned, with the right reserved to the landlord to distrain again, would, as it appears to us, be subversive

of the plain intent of the parties, and of the principle upon which it is held that a landlord may distrain the second time for the same rent, when he has abandoned the first at the request of the tenant.

The abandonment of the first distress must in this case, as it appears to us, be held to be an undoubted voluntary abandonment by the landlord, and with the view of surrendering all the tenant's goods to be dealt with in insolvency, and with the intention of looking to the proceedings in insolvency as his security in lieu of a distress.

But again we find that the distress made in September, although varying slightly from the first, the one being for \$600, and the second for \$591.88, still the second was made upon the same basis as the first, namely, that the term had been forfeited and avoided *ipso facto* on the execution of the assignment in insolvency on the 21st June, and it was made for the penal rent as well, which had accrued only in virtue of the forfeiture.

The assignee, it is true, says that he was in possession at the time of the second distress. Undoubtedly he was in possession of the goods of the insolvent, but he never had, nor was it pretended that he had, any interest in the term. The insolvent's assignment did not and could not pass it to him, and even if the landlord could agree with the assignee for the revival of the term in the hands of the assignee, notwithstanding the avoidance declared by the lease in the event of an assignment in insolvency, still it is not pretended that any such agreement was ever made or contemplated. If then the assignee had possession of the premises at the time of the second distress, it was not in virtue of the lease that he had possession, but it must have been in virtue of a special permission granted by Myles to the assignee to enable him the better to dispose of the estate in insolvency.

When the second distress was made the term was no longer in existence, but it was suggested that this distress in September could be supported under the Statute of Anne, having been made within six months after the termination of the term; but there is no pretence in this case that

the tenant Dill, or the assignee in insolvency as representing him, were in possession *holding over after the determination of the lease*, so as to come within the Statute of Anne. Both distresses may indeed be said to have been made after the determination of the term.

We do not well see how a valid agreement for the abandonment of a distress made under the Statute of Anne, after the determination of a lease, can be made so as to give a right to distrain again for the same rent, where the term is not set up again, that is to say, We do not well see how the two distresses made for the same rent under the Statute of Anne, after the determination of a lease can be upheld as valid.

For the above reasons, we are of opinion that the plaintiff is entitled to have the verdict entered for him for \$300, agreed upon as the value of the engine and boiler.

Rule absolute.

DRAKE V. WIGLE.

Waste—Tenant for life—Right to timber.

Held, that it is not waste, in a tenant for life, to cut down timber on wild land for the sole purpose of bringing it into cultivation, provided the inheritance be not damaged thereby, and it is done in conformity with the rules of good husbandry.

DECLARATION: for injury to the plaintiff's reversion, by cutting down and carrying away the trees and underwood upon his (the plaintiff's) land.

Plea: that the parcel of land in the declaration described, contained sixty-two acres by admeasurement: that the said parcel of land, before and at the time of making the demise hereinafter mentioned, was wild and in a state of nature, having thereon standing and growing beech, maple, black ash, and elm trees: that the said parcel of land, before and at the time of making said demise, was of little value, unless rendered fit for cultivation: that before the said parcel of land could be cultivated or rendered fit for cultivation, it was necessary that certain of the said trees growing and standing thereon, and underwood connected therewith, should be felled and removed therefrom: that the said standing timber, before and at the time of the making of the said lease, was an encumbrance on the said land, and such as in the Province of Ontario is and has been always usually cut and removed for the purpose of clearing land, and of no value simply as standing timber: that one William Drake, before and at the time of making the said demise, and at the time of the alleged injury to the plaintiff's reversion in the said land, was the tenant thereof for life, and entitled to the beneficial enjoyment thereof: that the said William Drake, being such tenant for life, demised, at a certain annual rental payable by defendant, the said land to the defendant for a term of years, to be used by the defendant for farming purposes with liberty to the defendant, from year to year during the term, to clear so much of the said land of the timber thereon standing and growing as might be necessary to

enable the defendant to cultivate the said land and pay rent for the same, doing no injury whatever to the plaintiff's reversion, and under all circumstances reserving sufficient timber for fencing, fuel, repairs, and other purposes incidental to the enjoyment of the said farm: that defendant, after the making of the said demise, entered into possession of the said land under the said demise; and for the purpose of cultivation, and for no other purpose, necessarily felled and cut down the timber standing and growing on forty-eight acres of the said land, being timber such as aforesaid described, reserving and did reserve the timber growing on fifteen acres of the said land, being more than sufficient for fencing, fuel, repairs, and other purposes aforesaid, and thereby rendered the portion of the said land so cleared in all respects fit for cultivation according to the custom of good husbandry in the Province of Ontario, and did afterwards enclose the same with lawful and suitable fences, and cultivated the same, and in no respect injured the plaintiff's reversion in the said lands in the declaration described; but, on the contrary thereof, made the said last mentioned parcel of land productive and of enhanced value to the plaintiff and others interested in the ownership thereof, which are the grievances in the declaration mentioned.

Demurrer: that the plea admits the cutting down of standing timber for other purposes than those for which tenants for life are authorized to cut down standing timber: that the tenant for life had no power to authorize the defendant to clear the land: that the plea admits the trespass without justifying it: that the plea is not a plea in bar, but merely in mitigation of damages: that for all that appears in the plea, the felled timber might have been left encumbering the land.

Robinson, Q.C., for the plaintiff. This plea is insufficient, because for all that appears in it, the timber may have been left encumbering the land, or it may have been sold as cordwood, thus depriving the reversioner of profit to which he was entitled. The broad question, however, is,

whether a tenant for life is guilty of waste for cutting down timber for the improvement of the land. The authorities shew, that even in such case it is waste; and if the law as it stands should be thought unsuitable to the circumstances of this country it remains for the Legislature, if it should think fit, to alter it, as has been done in England by the Imperial Act, 8 & 9 Vict., ch. 56: *Tayler v. Tayler*, 5 O. S. 501; *Lawrence v. Judge*, 2 Grant 301; *Weller v. Burnham*, 11 U. C. R. 90; *Seagram v. Knight*, L. R. 3 Eq. 398, L. R. 2 Ch. App. 628; *Woodfall*, L. & T., 10th ed., p. 503; *Simmons v. Norton*, 7 Bing. 640; *Taylor*, L. & T., 5th ed., p. 258, sec. 353.

Harrison, Q. C., contra. The plea is a good defence, as it shews that the cutting down of the timber was for the purpose of cultivation, and that sufficient was left for fencing, &c. The cases in England as well as here shew that whether the act amounts to waste or not depends upon the circumstances of each case. In this case it is admitted that it was done for the improvement of the land, and that while the timber is left standing the land is of no use, and in fact an encumbrance. Under these circumstances it cannot be held that what is done here is waste: *Seagram v. Knight*, L. R. 3 Eq. 398, L. R. 2 Ch. App. 628; *Weller v. Burnham*, 11 U. C. R. 90; *Lawrence v. Judge*, 2 Grant 301; *Chisolm v. Sheldon*, 1 Grant 318. In the several States of the United States the law is held to be as contended for by the defendant here, and the tenant for life has not been adjudged guilty of waste: *Hastings v. Crunkleton*, 3 Yates Penn. 261; *McCullough v. Irvine*, 13 Penn. 438; *Jackson v. Brownson*, 7 Johnson N. Y. 227; *Keeler v. Eastman*, 11 Vermont 293; *Clemence v. Steere*, 1 Rhode Id. 273; *Crockett v. Crockett*, 2 Ohio 180.

GALT, J.—The demurrer raises two questions: the first, as to whether a tenant for life is entitled to clear wild land for the purpose of bringing it into cultivation; the second, is more as to the form of the plea, as being pleaded in mitigation of damages.

I will dispose of the formal objection before considering the important objection raised by the first ground of demurrer.

The case of *Simmons v. Norton*, 7 Bing. 640, (it is an authority on both points), was an action for "Waste," and the only plea was the general issue *nul wast*.

Tindal, C. J., in giving judgment, says, "I do not say that that which is *primâ facie* waste may not be altered in its character, if, under particular circumstances, it should appear to have been done for the melioration of the land, but if that be so, it must be expressly stated on the record. In *Com. Dig.*, Pleader, 3 O. 7, it is laid down 'that the general issue, *no waste done*, may be pleaded in all cases where there is no waste, as if the destruction happens by tempest, lightning, enemies, &c.; but it is no plea where the defendant has matter of justification or excuse.' * * It is sufficient, however, to say, that the general issue applies only to cases where the act complained of is not the act of the party; if it be the act of the party, he must admit and justify it on the record, whenever he has matter of justification to allege; as, that he cut down timber for repairs; or pulled down to rebuild, a house in decay. The act being *primâ facie* waste, the defendant must shew the object and intent of his proceeding, and give the plaintiff the opportunity of taking issue on his allegations."

This is what is done in the plea before us. He alleges that he cut the timber for the purpose of improving the land, and that he did no injury to the reversion.

I am therefore of opinion that our judgment should be for the defendant on this objection.

As to the second point, this case brings up for decision, for the first time in this Province (as far as I can find), the question as to the rights of a tenant for life to clear wild land for the purpose of bringing it into cultivation.

By the common law a tenant by the curtesy was liable to an action for waste, but the point for our consideration is, whether what is admitted to have been done in this instance, it being admitted by the demurrer that what was

done was done for the purpose of clearing and cultivating the land, is necessarily waste.

It is quite clear from the authorities, many of which are cited in the case of *Phillipps v. Smith*, 14 M. & W. 590, and in the cases from the American Reports to which reference is hereafter made, that the term "waste" has no fixed definition; the true meaning seems to be, that the act complained of as waste must be one that occasions injury to the inheritance; and that many acts which would unquestionably be "waste" under one state of circumstances would not be so in another.

Alderson, B., in giving judgment in the case of *Phillipps v. Smith*, says, "On the other hand, those act are not wastes which, as Richardson, C. J., in *Barrett v. Barrett*, Hetley 35, says, are not prejudicial to the inheritance, as, in that case, the cutting of sallows, maples, beeches, and thorns, there alleged to be of the age of thirty-three years, but which were not timber either by general law or particular local custom. So, likewise, cutting even of oaks or ashes, where they are of seasonable wood, *i. e.* when they are cut usually as underwood, and in due course are to grow up again from the stumps, is not waste."

I have before quoted from the judgment of Tindal, C. J., in reference to the first point in this case, but some of his observations apply with great force to this head, namely, "I do not say that that which is *primâ facie* waste may not be altered in its character, if, under particular circumstances, it should appear to have been done for the melioration of the land."

When we bear in mind the natural state of lands in this Province, and that they are almost invariably useless for agricultural purposes until they have been cleared and cultivated, it appears to me that it would be highly inexpedient and unjust if we were to hold that a tenant by the curtesy could not bring the lands under cultivation by clearing and cultivating them; inexpedient, because it is for the interest of the public that the lands should be cultivated, and unjust because it would leave the tenant, or at

all events the land, subject to taxes, and so far from a tenant by the curtesy deriving a benefit from the lands of his deceased wife, he would be subjected to a loss.

We find that questions of this character have been before the Courts of the United States on several occasions, and although their decisions are not binding on us, yet they are entitled to the highest respect, not only from the learning of the learned Judges by whom they were decided, but because the state of landed property in that country is similar to our own. Moreover the common law of England prevails in many of the States, and in the cases which I have cited at length it will appear that the learned Judges considered their judgments as based upon and not contrary to that law.

Hastings v. Crunckleton, 3 Yeates Penn. 261. This was an action to recover land from a tenant in dower for waste committed in cutting down timber and clearing the land.

The counsel for the tenants insisted, that by cutting down timber and clearing lands, the widow had committed waste, and forfeited her interest in the lands, citing 1 *Co. Litt.* 53, *a. b.* 54, *a.*

But the Court said, "there was a material difference between the local circumstances of this State, and of Great Britain. It would be an outrage on common sense to suppose that what would be deemed waste in England could receive that application here. Lands in general with us are enhanced by being cleared, provided a proper proportion of wood land is preserved for the maintenance of the place. If the tenant in dower clears part of the land assigned to her, and does not exceed the relative proportion of cleared land, considered as to the whole tract, she cannot be said to have committed waste thereby."

Jackson v. Brownson, 7 Johnson 227. This was an action brought to recover possession by reason of a breach of covenant in a lease not to commit waste.

Van Ness, J., in giving the opinion of the majority of the Court, says, "But it is said, here has not been *waste*. It is a general principle, that the law considers every thing to be

waste which does a permanent injury to the inheritance : 1 *Co. Litt.* 53, 54; 1 *Cr. Dig.* 65; 6 *Com. Dig.* tit. *Waste*. Now, to say that cutting down the wood on almost every acre of the demised premises is not *waste*, within the spirit and meaning of the covenant in the case, is to say no waste, by the destruction of wood, can be committed at all. We are bound to give effect to this covenant, if we can, but to decide that the facts stated in the case do not constitute waste, would be to destroy it almost altogether. That the destruction of the timber is a lasting injury to the reversion cannot be disputed. * *

It is true, that what would in England be waste, is not always so here. The covenant must be construed with reference to the state of the property at the time of the demise. The lessee undoubtedly had a right to fell part of the timber, so as to fit the land for cultivation; but it does not follow that he may, with impunity, destroy all the timber, and thereby specially and permanently diminish the value of the inheritance. Good sense and sound policy, as well as the rules of good husbandry, require that the lessee should preserve so much of the timber as is indispensably necessary to keep the fences and other erections upon the farm in proper repair. The counsel for the defendant is mistaken when he says that lessees in England are prohibited from cutting wood upon the demised premises altogether; the prohibition, in principle, extends no further, in this respect, there than it does here. In England, that species of wood which is denominated *timber* shall not be cut down, because felling it is considered as an injury done to the inheritance, and therefore waste. Here, from the different state of many parts of our country, *timber* may, and must be cut down to a certain extent, but not so as to cause an irreparable injury to the reversioner. To what extent wood may be cut before the tenant is guilty of waste, must be left to the sound discretion of a jury, under the direction of the Court, as in other cases. What kind of wood in England is deemed to be timber, depends upon the custom of the country. Wood which in some countries is called timber

is not so in others. * * The principle upon which all these cases were decided is that which I have before stated : namely, that whenever wood has been cut in such a manner as materially to prejudice the inheritance, it is waste ; and that is the principle upon which I place the decision of this cause."

The Court were divided in opinion, but not on this point. On the contrary, the dissenting Judges appear to have been willing to carry the doctrine as regards waste here laid down to a greater length in favour of the tenant.

In *Keeler v. Eastman*, 11 Vermont 293, a bill was filed to stay waste, and for an account, &c. The defendant was tenant for life ; the plaintiff was the reversioner. Bennett, Chancellor, in giving judgment, says, at page 294 : " By the principles of the ancient common law, many acts were held to constitute waste—such as the conversion of wood, meadow or pasture, into arable land, and of woodland into meadow or pasture land—to which we might, not at the present day, be disposed to give that effect. These principles must have been introduced when agriculture was little understood, and they are not founded in reason, and many of them are inconsistent with the most important improvements in the cultivation of the soil. In England that species of wood, which is designated as timber, shall not be cut, because the destruction of it is considered an injury done to the inheritance, and therefore waste. From the different state of many parts of our country a different rule should attain in our Courts ; and timber may and must, in some cases, to a certain extent, be cut down, but not so as to cause damage to the inheritance. To what extent a tenant for life can be justified in cutting wood, before he shall be guilty of waste, must depend upon a sound discretion applied to the particular case. It is not in this State waste, to cut down wood or timber, so as to fit the land for cultivation, provided this would not damage the inheritance, and would be according to the rules of good husbandry, taking into view the location and situation of the whole farm."

In my opinion the question raised by these pleadings should on this demurrer be decided in favour of the defendant.

HAGARTY, C. J.—As I understand it, “Waste” is a spoil or destruction in houses, gardens, trees or other corporal hereditaments to the disherison of him in remainder or reversion, &c., or to the prejudice of the heir or reversioner: 1 *Co. Litt.* 53.

There is a summary of the cases in the notes to *Greene v. Cole*, Wm. Saund. ed. 1871, vol. ii., p. 651: “There is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burden upon it, or by impairing the evidence of title.”

This is the language used by Lord Denman in *Doe dem. Grubb v. Earl of Burlington*, 5 B. & Ad. 507, at p. 517.

He also says, speaking of some authorities, “they are illustrations of the principle, that where there are no damages there can be no waste; and to this effect is *Barrett v. Barrett*, Hetley 35.

He concluded by adding, “As the jury have found that the defendant did no damage to the estate, it follows there was no waste and no forfeiture.”

See also *Governors, &c., of Harrow School v. Alderton*, 2 B. & P. 86, before Lord Eldon, where the same doctrine is admitted. Heath, J., says, at p. 88, “If a tenant convert a furze-brake in which game have bred into arable or pasture, by which its real value would be improved, but its value to the landlord depreciated, it would be the business of the jury to assess damages to the landlord thereon.”

In *Doe dem. Earl of Darlington v. Bond*, 5 B. & C. 855, Bayley, J., says, at p. 857, “In this case it was possible that the value of the reversion might be increased by the alteration; it was, therefore, a question for the jury, whether waste to the value of 10s. had been committed.”

The old cases state that the lessee for life or years has but a special interest or property in the trees, being timber, as things annexed to the land: 4 *Co. Rep.* 62. He has an interest in them for fruit and shade: *Berriman v. Peacock*, 9 Bing. 384.

Waste is generally in reference to trees known as timber trees. They are so called according to local custom, and the scarcity or prevalence of particular kinds: 1 *Co. Litt.* 53 a.

Waste seems to me to be an expression necessarily bearing upon an actual injury to the estate of the reversioner, as has been said by diminishing the value, increasing the burden, or impairing the evidence of title.

Under this last head may be classed the alteration of the estate, *e. g.*, by turning pasture into arable, &c.

"I agree," says Knight Bruce, Lord Justice, in *Morris v. Morris*, 3 DeG. & J. 323, at p. 327, "That an act may be reasonable, may be judicious, may be beneficial to all the parties interested in a settled property, and yet it may be an act prohibited to a tenant for life, if a person interested in remainder chooses to interfere. I do not put the case, therefore, merely on the reasonableness, on the judiciousness, and on the beneficial nature of what was done, but they are ingredients in it."

Turner, L. J.: "I apprehend that the principle upon which the Court proceeds in these cases is, that the tenant for life of an estate is liable to account in equity for profit derived by him from an improper user of his legal powers, in committing equitable waste."

In *Coppinger v. Gubbins*, 9 Ir. Eq. 304, Sir E. Sugden, Chancellor, at p. 309, discusses the rights of tenants for life to cut turf for sale on bog land: "There may be such a demise, as referred to by the learned Judges, with whom I entirely agree in the cases cited; *e. g.*, where bog and nothing else is demised, and turf could be cut for no valuable purpose except for sale; or if it was a bog always cut for sale, and demised as such in the same manner as an open mine. Such cases depend on contract, and must be considered as standing on their own ground, and no doubt the lessees would have a right to cut turf and sell it."

In anonymous case, 1 Hogan 147, the Master of the Rolls, (1824), said "That where the soil and freehold of a bog has been demised as bog, or where all the land demised

is bog and only valuable as such, the tenant may, in analogy to the right acquired by a demise of a coal mine, cut it as he pleases for profit; and his Honour referred to the former cases in which he had investigated and decided this proposition."

In *Chatterton v. White*, 1 Ir. Eq. 200, at p. 202, the distinction was pointed out between such a case as the last, and that where bog was demised with other lands.

If there be any analogy between the manner in which an open mine or a bog held as such, apart from other land on a life estate, and a parcel of wild land in a state of nature covered with trees, it would seem that it ought not to be waste to cut such a reasonable portion of the trees as would render the land fit for cultivation according to the custom of the country.

I have been disappointed, so far, in not finding in our old books and Digests some reference to the clearing up of lands at a period when a large portion of England was covered with forest. Long after the beginning of legal memory or of reported law, there were extensive forest tracts, and we can hardly suppose that land was not brought into cultivation by the clearance of the woods and the agency of fire for the consumption of the encumbering timber.

For some time, even in this forest land, timber has become a most valuable article of sale, at least as much so as in England six centuries back, when statutes were passed on the subject of Waste in the reigns of Henry III. and his son, Edward I.

Yet the destruction of the forest by fire, for the purpose of clearing and cultivating, has still to be resorted to in Canada as the only means available to the settler in large sections of the country.

From all we know or read of the England of the first Edward, it is difficult to believe but that the same process was as necessary and as common as it is still here.

I am not aware of any express decision of our own Courts.

Weller v. Burnham, 11 U. C. R. 90, was an action by the reversioner against the tenant for life for cutting trees to the injury of the reversion. The plea in effect was that the trees were cut, &c., to and for the purpose of clearing the land, and improving and cultivating the same according to the custom of good husbandry and of Upper Canada, and thereby increased the value of the land, &c.

On demurrer the plea was held bad in form. Robinson, C. J., says at page 91: "Supposing that it were clearly lawful in this country for a tenant for life to change the character of the estate wholly or in part at his discretion, from woodland to arable-land, stripping it of all its timber, yet it is not averred here that the defendant did actually clear the land and make it fit for cultivation. It is consistent with all that is stated here, that the defendant may have cut the trees and left them lying there. He only says that he cut down the trees for the purpose of clearing the land. The main question, whether a tenant for life can justify cutting timber in order to clear the land, and without stating any more to shew the propriety or necessity of doing what was done, is not necessary to be determined."

Lawrence v. Judge, 2 Grant 301, was an application by the owner to restrain an occupant of land, who had gone into possession under the owner, from cutting down the timber, the evidence being contradictory as to the occupant's authority from the owner to sell timber.

Blake, C., says, "The application is rested on three grounds: first, because the principles on which Courts of Equity interfere, in England, to restrain the destruction of growing timber, are inapplicable to the forest lands of this country, with respect to which, it is argued, that proprietors would be sufficiently protected by an action of trespass * * * Unquestionably, some of the considerations applicable to this subject in England operate with very diminished force here; but, in my opinion, there is no principle upon which we could refuse to landed proprietors in this Province the same protection afforded them in England. Timber here, as there,

is part of the inheritance; being once destroyed, it cannot be set up again; the injury is irreparable, in the sense in which that term is used in relation to this subject, if not with reference to the extent—although that may be so occasionally—certainly with regard to the nature of this injury. Our refusal to interfere on that ground would therefore, in my opinion, be unwarrantable.”

Mr. Leith, in his edition of Blackstone, at page 245, has some carefully written remarks on this subject. He quotes all the authorities in this country bearing on the point, and, as might be expected from his extensive acquaintance with the laws affecting Canadian real estate, carefully sums up the argument for and against the proposition now before us. Amongst other points he notices how, if the trees cannot be cut, “the interest of the life tenant might not only be a worthless but *damnosa hereditas*, unless he be allowed to cut the timber and clear the land, for the life tenant is bound to pay off the taxes, at least if under the same title he takes profitable lands,” citing *Biscoe v. Van Bearle*, 6 Grant 438.

He also notices a case in *Rob. & Har. Dig. tit. “Waste,”* p. 448, *Taylor v. Taylor*, 1 Wm. IV., not reported, to the effect that an action of waste, under 6th ed. i. ch. 5, might be brought; “and where land was devised for life, with a reservation of the oak timber thereon, it was held that a power to dispose of other descriptions of timber was not thereby implied, and that the tenant for life was guilty of waste in disposing of such other timber.”

This unfortunately, as he shews, does not bear upon our point.

He further notices the case of *Chisholm v. Sheldon*, 1 Grant 318, where the Chancellor says, at p. 320, “We should have to consider, secondly, whether the doctrines of the common law, as to growing timber, can be applied in all their extent to forest lands in this country.” Again, “the estate was clearly capable of beneficial enjoyment without cutting any growing timber.” But the case did not require any decision on the main question.

The Act of Ontario, 32 Vic. ch. 7, sec. 3, declares that dower shall not be recoverable out of any separate or distinct lot or parcel of land, which at the time of the alienation by the husband, or at the time of his death, if he died seized, was in a state of nature and unimproved; preserving to the dowress her right to demand to have wood-land assigned to her from which she may take firewood necessary for her own use, and timber for fencing the other portions of land assigned to her of this same lot or parcel.

According to one view of this section it may be said that our Legislature considered land in a state of nature to be worthless. In another view, it may be said that they denied dower to the widow because she could not by law clear the land for cultivation, without committing waste.

My brother Galt has noticed several of the American cases where the Courts refused to apply the English rule to the wholly different circumstances of this country.

I may also refer to others mentioned in the note to *Phillips v. Smith*, 14 M. & W. 596, American edition.

In *Kent's Commentaries*, 11th ed., vol. iv., p. 82, the subject is well discussed from a point of view worthy of a Canadian Court. It is said the tenant may clear part of wild land for the purpose of cultivation. "But he must leave wood and timber sufficient for the permanent use of the farm. And it is a question of fact for a jury, what extent of wood may be cut down in such cases, without exposing the party to the charge of waste. The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged, and better accommodated to the circumstances of a new and growing country." But he adds that in Massachusetts the Supreme Court seemed to be "in favour of the strict English rule; and that was one of the reasons assigned for holding the widow not dowable of such lands."

A very recent judgment of Sir George Jessell, M. R., *Honywood v. Honwood*, L. R. 18 Eq. 306, is instructive on some points as to waste.

After mentioning that by the general law of England oak, ash, and elm, twenty years old and upwards, are timber,

and that the kind of tree which may be called timber may be varied by local custom, he proceeds, at p.309: "Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take it to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber estates, that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and, therefore, goes to the tenant for life."

It seems to me on all the authorities that "Waste," is a flexible term varying with local and other circumstances; that its essence is injury to the reversion; and that, if there be no damage thereto, especially in the action on the case for waste, there can be no recovery.

In the case before us there is no such injury, I think, as impairing the evidence of title, or imposing a greater burden on the inheritance.

The exception as to a "timber estate," mentioned by Sir George Jessell, shews how a law like that of waste is made to adapt itself to the varying circumstances of life, and the dictates of common sense.

When the state of England in the olden time more resembled that of our comparatively new country, I do not see anything in the authorities to have prevented the allowance to a life tenant of the right to resort to the only method by which any benefit whatever could be derived from a piece of aboriginal forest; namely, the clearance of a moderate part for cultivation, by removal of the trees.

On the whole, I have arrived at the conclusion, not of course without much doubt, that the plea here presents a

good *primâ facie* answer. It states, in effect, that the parcel of land contains 62 acres, and was wild and in a state of nature with trees growing on it, and of little value, unless rendered fit for cultivation : that to cultivate it it was necessary that some of the trees should be felled and removed : that the standing timber was an encumbrance, and such as in Ontario has always been cut and removed for clearing land, and of no value simply as standing timber ; and the defendant, for the purpose of cultivation and for no other purpose, necessarily felled and cut down timber standing on 48 acres, reserving 15 acres of standing timber, being more than sufficient for fencing, repairs, and other purposes incidental to the enjoyment of the farm, and thereby rendered the cleared portion fit for cultivation according to the custom of good husbandry in Ontario, and did lawfully fence and cultivate the same, and in so doing in no respect injured the plaintiff's reversion, but on the contrary made the land productive and of enhanced value to the reversioner.

I read the plea as justifying merely the "cutting down and carrying away the trees and underwood," as charged in the declaration merely for clearing purposes. Had the charge been of carrying away and selling the timber the defence would fail.

I think, if this plea be proved at the trial, the facts constitute a defence, and the verdict should be for the defendant.

GWYNNE, J., concurred.

Judgment for defendant.

CHAPMAN V. ZEALAND.

Bill of lading—Pleading—Estoppel—33 Vic. ch. 19, O.

The plaintiff as assignee of a bill of lading which stated that the goods were shipped in good order and well conditioned, sued for non delivery of the goods at their destination in the like good order and condition in which they were shipped. The defendant pleaded: 1. That the goods were not in good order and well conditioned when shipped. 2. That defendant did deliver them in the like order and condition in which they were shipped. *Held*, on demurrer first plea bad, as being no answer to the breach, second plea good.

Semble, that the Bill of Lading Act, 33 Vic. ch. 19, O., creates no estoppel as to the *condition* in which goods are when shipped.

DECLARATION: For that certain persons, to wit, Messrs. J. E. Jacques & Co., for the defendant, as Master of the steamer Calabria, and on his behalf, did make, sign, execute, and deliver to Messrs. Lafreniere & St. Onge a certain bill of lading, dated the 26th May, 1874, whereby it was acknowledged that certain goods, to wit, 420 bales of hay, of the said Messrs. Lafreniere & St. Onge, were shipped in good order and well-conditioned on board the said steamer Calabria, at the city of Montreal, to be carried to the city of Toronto; and the said defendant thereby promised to the said Lafreniere & St. Onge that the said goods should be delivered to them, or their assigns, in like order and condition, damage from heating, and the usual dangers and accidents excepted; that afterwards, the said Lafreniere & St. Onge endorsed said bill of lading for valuable consideration to the plaintiff, and the plaintiff became and is the holder of the bill of lading for value, and entitled to the property in the said goods; and although all conditions precedent have been performed, &c., and no loss or damage was occasioned by any of the excepted causes, yet the defendant did not deliver the said goods at Toronto in the like good order and condition in which they were shipped.

Second plea: that the said goods were not shipped in good order, and well-conditioned on board the said steamer Calabria, as alleged.

Third plea : that the defendant did deliver the said goods at Toronto in the like order and condition in which they were shipped on board said steamer.

The plaintiff demurred to these pleas on the grounds, 1. That the said pleas are no answer to the plaintiff's declaration. 2. That both the said pleas admit the giving of the bill of lading, stating that the goods were received in good order and condition, and the defendant therefore cannot, as against the plaintiff, be heard to deny what is stated in the bill of lading.

T. S. Kennedy, for the demurrer. The second and third pleas are bad. The bill of lading acknowledges the goods to be shipped in good order and condition, and under 33 Vic. ch. 19, sec. 3, O. the bill of lading in the hands of a consignee or endorsee for valuable consideration is conclusive evidence of such shipment. The defendant therefore, as against the plaintiff, whom it is admitted by the pleadings is a consignee for valuable consideration, is estopped from setting up that the goods were received otherwise than they are declared to be : *Meyer v. Dresser*, 16 C. B. N. S. 646. It may be contended by the defendant, on the authority of *Jessel v. Bath*, L. R. 2 Ex. 267, that the person signing the bill of lading is the only person liable, but according to *Beard v. Steele*, 34 U. C. R. 43, it is clearly laid down that where the person signing is the authorized agent of the master, the master is liable. This fact, however, really does not arise on the pleadings. Apart from the statute, the defendant is liable at common law. In *Bradley v. Dunipace*, 7 H. & N. 200 ; 1 H. & C., 521, the master was held estopped by the description of the weight given in the bill of lading. And in *Howard v. Tucker*, 1 B. & A. D. 712, where the bill of lading, contrary to the fact, alleged that the freight was paid, it was held that the bill of lading was conclusive evidence in favor of the endorsee for value, who took it on the faith of such statement. See also *Abbott on Shipping*, 11th ed., p. 281. It seems to be clearly laid down that the bill of lading must correctly state the quantity and condition of the goods shipped : *Abbott on Shipping*, 299.

MacKeehan contra. The defendant is not estopped from shewing the condition in which the goods were when shipped, as the Act 33 Vic. ch. 19, sec. 3, only applies to the non-shipment of the whole or some part of the goods, but not to their condition or quality: *Abbott on Shipping*, 11th ed., 281-3; *Grant v. Norway*, 10 C. B. N. S. 615. Also, according to *Jessel v. Bath*, L.R. 2 Ex. 267, liability under the Act only extends to the person actually signing, and therefore G. E. Jacques & Co., and not the defendant, are liable. The Act, however, is invalid as relating to trade and commerce, and therefore beyond the jurisdiction of the local Legislature. As to the defendant being liable at common law, it is quite clear that at common law a bill of lading is only looked upon as a receipt, and therefore as *prima facie* and not conclusive evidence of its contents.

GWYNNE, J. (a).—The contention of the learned counsel for the plaintiff was that the defendant was estopped by force of the Ontario statute, 33 Vic. ch. 19, from denying that the goods were shipped in good order. Mr. Mackelcan, on the contrary, contended that there was no estoppel as to condition of goods, the Act not extending to the condition, but to the fact of shipment; further, that the Ontario Legislature could not pass the law relied upon, as being one affecting trade and commerce; and thirdly, that the persons estopped would be the parties signing only, namely, Messrs. G. E. Jacques & Co.

It certainly does appear to me, although it is unnecessary to decide the point in this case, that the Bill of Lading Act, 33 Vic. ch. 19, which is the same as the Imperial Act, 18 & 19 Vic. ch. 111, does not create any estoppel as to the *condition* in which goods are when shipped. Any statement as to condition remains subject to the same consideration as before the Act.

In a recent case, *Blanchet v. Powell's Llantivit Collieries Co.*, L. R. 9 Ex. 74, Cleasby, B., clearly expresses the opinion, that even in an action against the master upon a bill of

(a) Argued during term before GWYNNE, J., alone.

lading for non-delivery, he is not by the Act estopped from disputing the *weight* stated in the bill of lading.

However, the point does not really arise here. The point arising is simply one of pleading, and in substance is that to a declaration by an assignee of a bill of lading, claiming compensation for injury sustained by certain goods during a voyage, otherwise than from causes excepted in the bill of lading, alleging that the goods when delivered at the port of arrival were not delivered in the like good order and condition in which they were shipped, the defendant pleads: 1. That they were not in good order and well conditioned when shipped; and 2. That the defendant did deliver them at Toronto in the like order and condition in which they were when shipped. The former appears to me to be no plea to the breach alleged; and the latter to be a very appropriate and good plea.

Judgment, therefore, will be for the plaintiff on the demurrer to the former plea, and for the defendant on the demurrer to the latter.

Judgment accordingly.

STEPHENS V. STEPHENS.

Pleading—Malicious arrest—Evidence—Venire de novo.

The first count for malicious arrest averred that the defendant charged the plaintiff with having caused the death of S. by administering a poisonous drug, and, upon such charge, procured a warrant for plaintiff's apprehension; and the charge in the information was to the same effect.

Held, bad, as disclosing no valid cause of action, for no felony was charged, and the administration of the drug might have been either accidental or as a medicine, so that there was nothing on which to found the magistrate's jurisdiction.

The evidence in this case shewed that defendant, having obtained the issue of the warrant, interfered personally in the arrest, telling the constable to have the plaintiff taken away, or right away. *Held*, sufficient to support a verdict on the second count, in trespass.

One count being good and the other bad, and the verdict general, the Court refused to arrest the judgment, but granted a *venire de novo*.

DECLARATION.—First count: for that the defendant falsely and maliciously, and without reasonable or probable

cause, appeared before a justice of the peace, and charged the plaintiff with having caused the death of one Frederick Smith Stephens, who had been the husband of the plaintiff, by administering to him, the said Frederick Smith Stephens, a poisonous drug; and upon such charge procured the said justice to grant his warrant for apprehending the plaintiff, and bringing her before the said justice to be dealt with according to law; and the defendant, under and by virtue of the said warrant, caused the plaintiff to be arrested and to be imprisoned for a long time, and afterwards to be brought in custody before the said justice; and then procured the said justice to remand the plaintiff to prison, and caused the plaintiff to be imprisoned for another long time, and afterwards to be brought before certain other justices of the peace; and the said last mentioned justices having heard the said charge, dismissed the same, and discharged the plaintiff out of custody; and by reason of the premises the plaintiff has been injured in her reputation, and suffered pain of body and mind, and was prevented from attending to her business, and incurred expense in defending herself from the said charge, and obtaining her release from the said imprisonment.

Second count: that the defendant assaulted the plaintiff and imprisoned her upon a false charge made by the defendant, that the plaintiff had administered a poisonous drug to one Frederick Smith Stephens, and thereby caused the death of the said Frederick Smith Stephens, whereby the plaintiff suffered great pain of body and mind, and was exposed and injured in her credit and circumstances, and incurred expense in obtaining her liberation from the said imprisonment.

Plea—Not guilty.

The cause was tried before Wilson, J., and a jury, at Toronto, at the Winter Assizes of 1874.

It appeared that the defendant had accused the plaintiff of having poisoned her husband, and went before a magistrate and laid an information. The information stated that the defendant had "good reason to believe that the death of

Frederick Smith Stephens," &c., (the plaintiff's husband,) "was caused by the administration of some poisonous drug by Jane Stephens, his wife, on or before the 15th of March last." On the information being sworn, the magistrate offered to issue a summons for the appearance of the plaintiff to answer the charge, but the defendant required that a warrant should issue for her arrest; a warrant was accordingly issued, and the plaintiff arrested and brought before three magistrates, who, after hearing the evidence, dismissed the case and discharged the plaintiff.

One Emmeline Conklin, who was called as a witness, proved that she was at the plaintiff's house when the constable came to make the arrest, and heard the defendant tell the constable, as he came into the house and before the arrest, to have the plaintiff taken away, or taken right away; and she saw the plaintiff arrested.

This was corroborated by other evidence, though not quite so express.

On the part of the defendant, it was objected that the action was not maintainable on the first count, as it was not alleged that the plaintiff administered the poison with a felonious intent, and it might have been purely accidental, or as a medicine; and that there was no evidence to go to the jury on the second count, as the plaintiff was arrested by the constable under a warrant handed to him by the magistrate.

The learned Judge overruled the objections, and left the case to the jury.

The jury found that the defendant acted maliciously and without reasonable and probable cause, and gave a verdict for the plaintiff generally.

In Hilary term, *Harrison*, Q. C., obtained a rule nisi to set aside the verdict entered for the plaintiff, and for a new trial for misdirection of the learned judge, in holding that the first count was maintainable, and that the same was proved; and, also, for holding that there was evidence to go to the jury to render the defendant liable under the second

count ; or why the judgment on the said verdict should not be arrested, on the ground that the verdict was general, and the first count bad.

In the same term *McMichael*, Q. C., shewed cause. The first count, which is in case, is maintainable, and was strictly proved as laid. It is proved that the defendant charged the plaintiff with having caused the death of her husband, by administering poison to him, the defendant knowing that the charge was false. This is clearly an actionable wrong, for which the defendant is liable. Then, as to the second count for trespass. No doubt if the defendant had merely gone to the magistrate and made a charge, believing it to be true, upon which the magistrate acted and issued a warrant, then there might be no liability : *Smith v. Evans*, 13 C. P. 60. But where a person officiously interferes to cause an arrest, giving orders and directions to constables, he is responsible. In this case, it is proved that the warrant was issued at the instigation of the defendant, the magistrate desiring to issue a summons ; and when the constable went to make the arrest, the defendant interfered to have the plaintiff immediately arrested. There was clearly evidence to go to the jury of a trespass by the defendant : *Hunt v. M'Arthur*, 24 U. C. R. 257. Both counts of the declaration are good, and therefore the judgment cannot be arrested.

Harrison, Q. C., contra. The first count is clearly bad, as it does not charge any criminal offence. From all that appears, the administering of the poison might have been accidental or as a medicine. Then, as to the second count, it certainly was not proved. The defendant goes before a magistrate, and lays an information, upon which the magistrate acts and issues his warrant, and hands it to the constable who arrests the plaintiff. In order to render the defendant liable, it must be proved that the defendant was the sole moving cause of the arrest, whereas it is proved here that he took no part in the arrest, and was not present when it was made. The cases clearly shew that persons are not to be put in peril for making a complaint, where they *bonâ fide* believe that a

crime has been committed. The defendant acted within the law, and is no way a trespasser; *Smith v. Evans*, 13 C. P. 60; *Hunt v. McArthur*, 24 U. C. R. 254; *Grinha v. Willey*, 4 H. & N. 496; *Leigh v. Webb*, 3 Esp. 165; *McNellis v. Gartshore*, 2 C. P. 464; *Cohen v. Morgan*, 6 D. & R. 8. The remedy is against the magistrate, and not against the defendant: *Hill v. Bateman*, 2 Str. 710; *Stevens v. Clark*, Car. & Marsh. 509; *Chivers v. Savage*, 5 E. & B. 701. The verdict having been entered generally, and the first count bad, the defendant is entitled to have the judgment arrested.

HAGARTY, C. J., delivered the judgment of the Court.

We think there was evidence to uphold the verdict for the plaintiff on the trespass count.

It is sworn that the defendant did personally interfere in the arrest.

Emmeline Conklin swears that she heard the defendant say to the constable as he came into the house, and before the arrest, to have the plaintiff taken away, or taken right away; and she saw the plaintiff arrested.

There is some other evidence corroboratory of this, though not quite so express.

The authorities are in favour of holding this to be sufficient to connect the defendant with the trespass, even if his applying for and obtaining the issue of the warrant would not make him liable.

The difficulty arises from the objections to the first count and the fact of the verdict being taken generally on both.

The count avers that the defendant charged the plaintiff with having caused the death of Frederick Smith Stevens by administering to him a poisonous drug, and upon such charge procured a warrant for apprehending the plaintiff, &c. The information states that the death of the said Frederick Smith Stephens was caused by the administration of some poisonous drug by the plaintiff. No felony is charged or suggested, either in the information or in the pleading, and the administration of the drug may have been either accidental or as a medicine.

It appears such a count discloses no valid cause of action. It is not an improper setting in motion of the criminal law, but a mere void proceeding, an information disclosing no offence, and nothing to found the magistrate's jurisdiction.

Smith v. Evans, 13 C. P. 60; *Hunt v. McArthur*, 24 U. C. R. 256; *Campbell v. McDonell*, 27 U. C. R. 343; *Chivers v. Savage*, 5 E. & B. 697, may be referred to.

We find that the practice is not to arrest the judgment, where one count is good and the others bad, on a general verdict, but to order a *venire de novo*: *Emblin v. Dartnell*, 12 M. & W. 830.

Our judgment, therefore, must be to order a *venire de novo*.

Rule absolute.

THOMPSON V. THE GREAT WESTERN RAILWAY COMPANY.

R. W. Co.—Liability of, for improper state of railway crossing—4 Wm. IV., ch. 29, sec. 9.

The rails of defendants' track where it crossed a highway projected from eight to nine inches above the level; and while the plaintiff with a pair of horses and waggon was crossing over, an engine standing close by whistled to give notice of the train starting. This caused the horses to start forward, striking the waggon against the projecting rails and breaking the whipple-tree, in consequence of which the horses ran away and one of them was injured.

Held, that defendants would not be liable if the whipple-tree was broken by the sudden starting of the horses without reference to the state of the track, for it was not proved that the blowing of the whistle was an unnecessary and unlawful act; but that if the accident happened through the defective state of the track they would be liable, and the case should have been left to the jury, without any evidence on the plaintiff's part to shew what the state of the highway was before defendants' railway intersected it.

APPEAL from the judgment of the County Court of the County of Elgin.

The action was for damages sustained by the plaintiff through the negligence of the defendants.

The case was briefly as follows:—The railway of the defendants crosses a highway in the township of Malahide. On the west side of this highway, and close thereto, there

was a railway station, in consequence of which there were several tracks which cross the highway at the point where the accident took place; and according to the evidence, the iron rails were from eight to nine inches, at the northern end of the crossing, above the level of the highway. The railway crossing appeared to have been only about twelve feet in width, leading north and south, which was crossed east and west by the tracks. On the occasion of the accident, as the plaintiff approached the crossing he saw a locomotive standing; he first observed it when he was within about twenty rods from it. He then drove, as he stated, very carefully across the crossing, and had reached the last railway track, the rails of which were, according to the evidence of another witness, nine inches on one side, and about eight and a-quarter on the other, above the level of the ground. When within two and a-half rods of the locomotive, the engineer blew the whistle, which frightened the plaintiff's horses, and they springing forward struck the waggon against the rails, which caused the whipple-tree to break. The plaintiff held on to the horses for some rods, but the horses pulled the reins out of his hands, and ran about forty rods, when one of them fell and broke its leg. The waggon of the plaintiff was loaded with sand, and he appeared to have been walking beside it when the horses drew the reins out of his hand and got away, the waggon being left on the track.

At the close of the plaintiff's case, it was objected by the defendants that the plaintiff could not recover, on the ground that under the provisions of 4 Wm. IV., ch. 29, sec. 9, which are made applicable to the railway now in question by 33 Vic., ch. 33, sec. 3, O., the Legislature has authorized the defendants to cross highways, whenever it shall be necessary, for the construction of the railroad to intersect any road or highway, provided that they restore the highway or road so intersected to its former state, or in a sufficient manner not to impair its usefulness. Also, that there was no evidence that the blowing of the whistle was either an unnecessary or improper act.

The learned Judge entered a nonsuit on these objections, but reserved leave to the plaintiff to move to have the verdict entered in his favor.

In the following term the plaintiff obtained a rule *nisi* to set aside the nonsuit, and to enter a verdict for him, pursuant to the leave reserved; or for a new trial on the law, evidence, and weight of evidence.

This was subsequently argued, and judgment delivered discharging it.

From this judgment the plaintiff appealed.

Rewl, Q. C., for the appeal. There was clear evidence of negligence on the part of the defendants to go to the jury. It is not shewn that there was any necessity for blowing the whistle. But assuming the whistle was lawfully sounded, and that therefore of itself it did not constitute negligence, there was clearly negligence in allowing the rails to project eight and a-half inches above the level, and but for which it is proved that the accident would not have happened. The case of *Oliver v. North Eastern R. W. Co.*, L. R. 9 Q. B. 409, shews that where an accident happens from the rails being too high above the level, the company are liable. It therefore should have been left to the jury to say whether the defective state of the crossing was the cause of the accident. See also *Directors, &c., of East London R. W. Co. v. Wanless*, L. R. 2 H. L. 12; *Shearman and Redfield* on Negligence, 3rd ed., p. 528, sec. 452; *Clayards v. Dethick*, 12 Q. B. 439.

Barker, (of Hamilton,) contra. There was clearly no negligence in blowing the whistle, as it was a lawful act done to give notice of the starting of the train; and it is quite clear that the blowing of the whistle was the cause of the accident. As to the rails projecting above the level, this of itself does not constitute negligence, as the Act, 4 Wm. IV., ch. 29, sec. 9, which governs the defendants, only requires the company to restore the highway to its former state, or so as not to impair its usefulness; and it was not shewn what the state of the highway was, or that

it was in fact a highway, before the railroad was built. As a matter of fact, however, the part where the rails projected was not on the travelled part. *Oliver v. North Eastern R. W. Co.*, L. R. 9 Q. B. 409, proceeded upon the express wording of the enactment governing it.

GALT, J., delivered the judgment of the Court.

As we fully concur in the opinion of the learned Judge on the latter point raised, it is unnecessary to discuss it.

As to the first point, by the 9th sec., of 4 Wm. IV., ch. 29, it is enacted, that whenever it shall be necessary for the construction of the railway to intersect any road or highway, it shall be lawful for the corporation to construct their railway across or upon the same, provided that the corporation shall restore the road or highway thus intersected to its former state, or in a sufficient manner not to impair its usefulness.

Under these provisions the learned Judge was of opinion "that the defendants were not bound to keep the highway in repair generally, but they were bound in the construction of their railway not to destroy or impair its usefulness; that if the highway had been previously impassable, the defendants were not bound to make it passable, nor to do more than restore or maintain it in as good a state as they found it previously to their railroad being made; but there was no evidence whatever of what the state of the highway had previously been, and therefore that the case was properly withheld from the jury under the pleadings, and a nonsuit entered, because there was no duty shewn, and therefore no neglect of it."

In other words, the learned Judge was of opinion that it was incumbent on the plaintiff to shew what the state of the highway was before the line of the defendants intersected it; and that in the absence of such evidence, the plaintiff was not entitled to recover.

With great respect for the opinion of the learned Judge, and without calling in question the correctness of his views in cases similar to that of *Cotton v. Wood*, 8 C. B. N. S.

568, we think that when it was shewn that there were rails projecting from eight to nine inches above the level of the road, there was sufficient ground to call upon the defendants to shew that they had complied with the proviso on which alone they were authorized to carry their railway across the highway ; and that the case was not one that could be withheld from the jury. They should have been asked whether the defendants had restored the road or highway in such a manner as not to have impaired its usefulness, and whether it was owing to their not having done so that the loss complained of by the plaintiff occurred. If the jury should be of opinion that the whippletree was broken by the sudden starting of the horses without reference to the state of the crossing, then we agree with the learned Judge that the plaintiff would not be entitled to recover, as the blowing of the whistle was not shewn to have been an unnecessary and unlawful act ; but if, on the other hand, the evidence satisfied them that the accident happened by reason of the defective state of the crossing, arising from the condition of the defendants' track, we are of opinion that the defendants would be liable.

The case should therefore have been submitted to them.

Our judgment is, that the appeal be allowed, and that the rule in the Court below be made absolute for a new trial.

Appeal allowed.

RE LONDON ELECTION CASE.

PRITCHARD V. WALKER, AND WALKER V. PRITCHARD.

Parliamentary election—Corrupt practices at—Evidence of the candidate's knowledge and consent.

In an election case, on appeal from the judgment of the presiding Judge at the trial—*Held*, that the circumstantial evidence, as set out below, was sufficient to shew that corrupt practices were committed by the agents of the respondent, and with his knowledge and consent, notwithstanding his disclaimer on oath. It is sufficient to shew the candidates knowledge of and assent to the fact that his agents were using bribery to procure his election, without connecting him with any particular act of bribery ; and his assent must be assumed from his non-interference or objection when he has the opportunity.

Seemle, that wilful intentional ignorance is the same as actual knowledge.

At the last election of a member for the House of Commons for the City of London, John Carling and John Walker, Esquires, were the candidates, and the latter was returned as duly elected. A petition was duly lodged against his return under the Controverted Elections Act of 1873, which came on for trial on the 7th of September, 1874, and following days, before the Chief Justice of this Court, who, after hearing the evidence which was adduced, rendered the following judgment, namely :

1. That the respondent, John Walker, through and by his agents in that behalf, did employ means of corruption in the bribery of voters.

2. That the respondent was not duly returned or elected, and that the election was void : that no corrupt practices had been proved to have been committed with the knowledge and consent of the respondent : that corrupt practices had extensively prevailed at said election ; and seventeen persons were reported as having been guilty of corrupt practices ; and the respondent was ordered to pay all costs. The judgment will be found reported in 10 C. L. J. N. S. 281.

From this judgment the petitioner appealed to the Court of Common Pleas, under the 35th section of 37 Vic. ch. 10, for the following reasons, alleged in his notice of appeal :

That upon the law and evidence the learned Judge should have declared the respondent to have been found guilty of having employed and used means of corruption, by giving sums of money and promises of the same with intent to corrupt or bribe electors to vote for the said respondent, and to procure his election ; and that the said respondent was incapable of being a candidate or of being elected and returned during the Parliament for which the said election was held ; and that upon the law and evidence the learned Judge should have found and declared that corrupt practices had been proved to have been committed by and with the knowledge and consent of the said respondent at the said election by using the means of corruption hereinbefore stated.

Mr. Walker, the member returned as duly elected, also appealed from the judgment under the same clause of the Act above cited, for the reasons following, alleged in his notice of appeal, namely :

1. That he was not proved to have directly or indirectly employed any means of corruption by giving any sum of money, office, place, employment, gratuity, reward, or any bond, bill, or note, or conveyance of land, or promise of the same, nor was he, either by himself or his authorized agent for that purpose, found guilty of threatening any elector with losing any office, salary, income, or advantage, with intent to corrupt or bribe any elector to vote for him, or to keep back any elector from voting for any other candidate, nor was he found guilty of opening and supporting, or causing to be opened and supported, at his costs and charges, any house of public entertainment for the accommodation of the electors ; and that the employing of any of the above means of corruption by any agent or agents not authorized for that purpose, should not vacate the election of the appellant Walker, and that he should not have been unseated.

2. That even if the employing of any of the above means of corruption by any agent or agents, not authorized for that purpose, does under the law vacate

the seat of any candidate, corrupt acts were not proved to have been committed by any agent or agents of the appellant, within the meaning of the law; and that the appellant Walker should not have been unseated; and,

3. That upon the law and evidence the petition against his return should have been dismissed.

The appeal and cross appeal were argued in Michaelmas Term by ROBINSON, Q.C., and STREET for the petitioner, and by HARRISON, Q.C., and A. F. CAMPBELL for the sitting member.

Robinson, Q.C., and *Street*, for the appellant Pritchard, contends, on his own appeal, 1. That the learned Chief Justice should have found, as a matter of fact, that the corrupt practices were committed with the knowledge and consent of the respondent; and, 2. That what he has found amounts in effect to such a finding. No doubt there must be both knowledge and consent, but when knowledge of corrupt practices is proved, coupled with the opportunity of interfering to prevent them, consent will be presumed, in the evidence of evidence to the contrary. The evidence here is conclusive and irresistible. It is proved that bribery was carried on in the most wholesale manner, with little or no attempt at concealment, and its existence was notorious. Over \$9,000 was shewn to have been spent; \$2,000 advanced by the respondent himself; \$1,000 by his partner, Smallman; and \$6,000 by his solicitor, and most intimate personal friend; with other small sums admitted to have been expended during the canvass. All this money went into the central committee rooms, where the respondent, with Smallman and Dixon, were in daily attendance, and from thence it was paid out, chiefly by Smallman and Dixon, his agents for all purposes connected with the election, legitimate or otherwise. By them it was handed to the most active and prominent of the respondent's supporters, most of them committee men in the different wards, persons well known by the respondent as active workers on his behalf, with whom he

was in constant communication as such, and with many of whom he was in the habit of canvassing. By these men it was expended, during a period of three weeks, in almost innumerable acts of direct corruption and bribery ; and the respondent during all this time was engaged day and night in a personal canvass among the voters so bribed. In the face of this evidence, the respondent's denial that he was aware of the existence of bribery, which was known to the whole constituency, must be regarded as incredible. He may possibly have known of no specific instance, because he may have taken care not to ask, and his agents may have been careful not to inform him, but this ignorance, if it existed, while he knew perfectly well that corruption was being generally practised, is quite immaterial. To give it any weight would be to make the statute a dead letter. Secondly. The finding of the learned Chief Justice is in effect a finding that bribery was committed with respondent's knowledge and consent. He says : " Actual ignorance of the prevalence of bribery in this case can only be preserved by a wilful and determined resolution to be and remain ignorant ; by a studious and systematic refusal to listen to anything he hears as to the expenses of the election ; by insisting on the subject being always a forbidden subject of discussion ; by shrinking from it, and averting the eyes from it, whenever it appeared to be coming to light, and by a tacit, if not express, understanding between all the instruments of corruption, that the party chiefly interested should be kept in ignorance of the wickedness that was being daily practised. I am compelled to conclude that only by the most rigid adherence to such a stringent system could the respondent be able, with literal truth, to make the statement of innocence that he has made before me." It would be impossible to put the case more strongly, or to frame a finding more clearly condemning the respondent. Wilful ignorance is for all the purposes of this case, and admitting the proceeding to be a penal one, the same as actual knowledge ; for this is a rule which obtains both at common law and in equity, and in criminal as well as civil proceedings : *Kerr* on Fraud, 176 ; *Story's* Equity

Jurisprudence, 10th ed., vol. i, sec. 399; *Ogilvie v. Jeaffreson*, 6 Jur. N. S. 970; *Dart*, V. & P., 4th ed., vol. i, p. 787; *Bishop on Criminal Law*, 5th ed., vol. i, 301-3. It cannot be said that there was no duty incumbent on the respondent. Being a candidate for a public office, he should at least have taken reasonable care to see that everything was carried out properly: *Bishop on Statutory Crimes*, secs. 820-5; *Owen v. Homan*, 17 Jur. 861.

Harrison, Q. C., and *A. F. Campbell*, for the respondent. The proper construction to be placed on section 18 of 36 Vic., ch. 27, is that the disqualification of the candidate being of a penal character, the Act must be considered strictly, and the privity of the respondent must be proved by the strongest affirmative evidence. This is the construction placed upon all similar English statutes from the 7 & 8 Wm. III., ch. 25, the first Act on the subject, to the present time: *Hughes v. Marshall*, 2 C. & J. 118-9; *Dungarvan case*, 2 P. R. & D. 323; *Cooper v. Slade*, 6 H. L. C. 792. The petitioner must either prove that the respondent personally bribed, or that he had direct personal knowledge. There is no direct evidence, but merely a matter of suspicion; and the cases shew that this is not sufficient: *Tamworth case*, 1 O'M. & H. 84. As to Harris, the evidence shews that he had no business connection with the respondent, and was not his legal adviser, but Magee was; and as to his partners, he positively swears that he never even suspected that they were spending money illegally. He also swears that he was never asked for any money, and never suspected that any money was being spent illegally, and never did canvass the persons bribed, as he was given a list of the persons he was to see, which did not contain the names of the persons bribed. As to his lordship's finding amounting to a finding that the respondent was guilty of wilful ignorance, this had nothing to do with the finding, as his lordship has found that there was no knowledge. The cases referred to on the other side do not apply, as they are based on a duty, and it is not a question of negligent performance of a duty, but of knowledge of a fact. If it had been proved that the respondent refused to listen when bribery was mentioned, or turned away and would not see what

was going on, there might be some ground for saying that he kept himself "wilfully ignorant;" but there is nothing of the kind here. *Kerr* on Fraud, and the other authorities referred to, do not apply here; while the election cases on the subject shew that the evidence here is not inconsistent with innocence, and so not sufficient to prove knowledge: *Tamworth case*, 1 O'M. & H. 84; *Westminster case*, 1 O'M. & H. 95. The cases also shew that it is in the interest of agents to keep such knowledge from the respondent, and while everybody else would be fully aware of what was going on, the respondent at the same time might be in total ignorance: *Taunton case*, 2 O'M. & H. 74-5. The fact also of the respondent, as soon as he heard of Harris having spent money, going and speaking to him about it, shews that he had no desire to hide anything. The appeal should therefore be dismissed.

Robinson, Q. C., in reply. The evidence clearly shews that the respondent knew that bribery was going on, for he put spies to watch the other side; and as to his never having been asked for money, one of the witnesses stated that defendant told him that parties were hounding him for money. It would have been impossible to have found a person in London who did not know that money was being spent by defendant's agents. The authorities shew that under the facts here there was personal knowledge which should be attributed to the defendant: *Regina v. Cullen*, 9 C. & P. 681; *Regina v. Briggs*, 7 Cox, C. C. 175; *Regina v. Curgerwen*, L. R. 1 C. C. 1; *Regina v. Hibbert*, L. R. 1 C. C. 184. [HAGARTY, C. J., referred to *Mullins v. Collins*, L. R. 9 Q. B. 293, where the knowledge of a licensed victualler of the act of his agent, under the Licensing Act, was in question.]

On the cross appeal:

Harrison, Q. C., and *A. F. Campbell*, for the appellant Walker. The learned Judge had no power to set the election aside, and vacate the seat, for bribery by an agent, without the knowledge or consent of the candidate. This can only be done, if at all, under the common law of Parliament, notwithstanding the decision of *Regina v.*

Gamble and Boulton, 9 U. C. R. 546, followed by the *South Grey Election Case*, 8 L. J. N. S. 17; for the common law of Parliament is no part of the common law of Canada. And the cases of *Fenton v. Hampton*, 11 Moore. P. C. 347; *Dill v. Murphy*, 1 Moore. P. C. N. S. 487; *Speaker of the Legislative Assembly of Victoria v. Glass*, L. R. 3 P. C. 560, are relied upon as supporting this contention. This election was held in 1873, under 36 Vic., ch. 27; but that Act in no manner introduces the common law of Parliament. The subsequent Act, 37 Vic., ch. 9, introduces the common law of Parliament, but that Act in no manner affects elections held in 1873. The common law of Parliament is under 34 Vic., ch. 3, sec. 46, O., as amended by 36 Vic., ch. 2, sec. 3, O., applicable to elections for the local Legislature, but inapplicable in 1873 to elections for the Dominion Legislature. Then, assuming that there is power to set aside an election for bribery by an agent, without the knowledge or consent of the candidate, there is no proof of any such agency here. Dixon was the only agent appointed by the appellant, and there is no proof of bribery by Dixon, or by any person appointed by him. The bribery proved was by persons who volunteered to support the candidate, and who were not in any manner authorized or employed for the purposes of the election: *Bridgewater case*, 1 O'M. & H. 115; *Westminster case*, 1 O'M. & H. 91-92; *Wigan case*, 1 O'M. & H. 189; *Shrewsbury Case*, 2 O. M. & H. 36; *Taunton case*, 2 O'M & H. 73.

Robinson, Q. C., and *Street*, for the respondent. The respondent's appeal is clearly untenable. There is no question but that under sec. 18 of 36 Vic., ch. 27, there is authority to vacate the election. The agency of the persons guilty of bribery was proved beyond question, and was expressly admitted at the trial. The words "directly" and "indirectly" used in the Act, are used directly as referring to the candidate, and indirectly to the agents: *Webb v. Smith*, 6 Scott 147.

Harrison, Q. C., in reply. The 36 Vic., ch. 27, sec. 18, does not allow an election to be avoided for bribery by an agent without the knowledge or consent of the candidate.

The words "directly or indirectly," as used in that section, mean directly or indirectly with the privity or knowledge of the candidate. This is shewn by the fact that a finding under that section not only avoids the election but renders the candidate incapable of being a candidate or being elected or returned to that Parliament. Such a consequence ought only to follow, and is intended only to follow, personal guilt of some kind: *Dungarvan case*, 2 P. R. & D. 325, 333.

GWYNNE, J.—The effect of the 35th sec. of 37 Vic. ch. 10, is upon these appeals to throw open the whole matter to be determined by the full Court.

This section enacts that upon the appeal being laid as therein directed, "the said appeal shall thereupon be heard and determined by the full Court, and such judgment shall be pronounced both upon questions of law and of fact as should in the opinion of the said Court have been delivered by the judge who originally tried the matters of the petition; and the registrar, clerk, or other proper officer of the said Court shall thereupon certify to the Speaker the judgment and decision of the said Court upon the several questions and matters of fact as well as of law upon which the Judge might otherwise"—that is, but for the appeal, "have determined or certified his decision in pursuance of this Act, in the same manner as the Judge would otherwise have done; and the said judgment and decision shall be final to all intents and purposes."

In the opinion of the learned Chief Justice who tried the case, the Court can decide on the questions of fact arising in this case as readily as he could himself at the trial, as the evidence was not contradictory, and nothing would depend on the demeanor of the witnesses or their manner of giving their evidence."

Mr. Robinson's contention upon behalf of the petitioner was, 1. That the learned Chief Justice should have found as a fact that corrupt practices had been proved to have been committed with the knowledge and consent of the

respondent; and 2. That what has been found does in law amount to a finding that corrupt practices have been committed with the knowledge and consent of the respondent.

I propose, therefore, firstly, to consider the case as it strikes my own mind upon the most thorough consideration I am capable of giving the whole evidence; and secondly, to consider it in view of certain conclusions and inferences drawn from the facts by the learned Chief Justice at the trial, the points in issue being :

1. Whether or not the election of the said John Walker should be declared void for any reason.

2. Whether or not by reason of bribery committed by himself personally, or by any persons or person, his agents or agent, and for whom he should be and is responsible.

3. Whether or not any persons or person, his agents or agent, did with his knowledge and consent employ any of the means of corruption pointed out in the 18th sec. of 36 Vic. ch. 27, with intent to corrupt or bribe any elector to vote for him, or to keep back any elector from voting for the other candidate; and

4. Whether or not the respondent Walker is proved to have been guilty of using any of the means of corruption referred to in such 18th section to procure his election within the meaning of that section.

The respondent says that the first time he took any interest in politics was in 1867, when he was upon what he calls the government side, which was represented by Mr. Carling. At the Dominion Election of 1872, he also interested himself for Mr. Carling, who was elected. The local election took place very shortly after that election, and he was then interested for, and voted for, the candidate who was elected, and who, as I understand, came out under the auspices of the same party as supported Mr. Carling. The respondent had never subscribed to the Reform Association, or to any person for them or for their benefit.

In the latter end of December, 1873, he first thought of being a candidate in opposition to Mr. Carling, and he was taken up and supported by the Reform Association, of which one John R. Dixon was Secretary.

Having resolved to come out as a candidate, the respondent appointed this Mr. Dixon to be his agent, and put it in his charge, as he himself says, to manage the business matters of the election for him. He and Dixon did not *together* make any estimate of what sum would be necessary for the expenses attending the election.

The respondent says that Dixon himself alone made such an estimate, and suggested the sum of \$1000 as all he thought he would require for legitimate expenses; and accordingly the respondent agreed to place that sum in his hands for the purposes of the election.

Dixon himself says that he made no calculation whatever as to what the expenses ought to be; but he says that the respondent told him that he would give him \$1000 for the purposes of the election, and that he said that one Smallman, who was a partner in business with the respondent, would let him have the sum.

The respondent having thus appointed Mr. Dixon to be his general manager of the election, and having agreed to place him in funds to the extent of \$1000, through the hands of his partner Smallman, to be expended by Dixon for the purposes of the election, gave directions to Smallman, as also to one Reaves, who was also a partner of the respondent in business, to give to Dixon \$1000, as he should require it, out of respondent's moneys, (over which Smallman and Reaves as his partners, I presume, had control), to be charged to him.

When this direction was given does not appear, nor when precisely the moneys were from time to time placed in Dixon's hands. The latter says, that he got the \$1000 in cash from Smallman in *three*, I presume it should be in *five*, sums of \$200 each, the last \$200 having been given to him about the middle of the week before the election, which took place on the 29th January, 1874. It would therefore be about the 20th of January that this last sum of \$200 was given by Smallman to Dixon.

Before, however, Dixon had received any sum from Smallman under this authority, he received from the respon-

dent himself \$100, when Dixon first opened the committee rooms in the first week in January; and again *about the middle of January*, Dixon informing the respondent that he had some payment to make, and that he could not find either Smallman or Reaves, asked for and received from the respondent, another \$50, thus making \$1150 in all of respondent's money placed in his hands for the purposes of the election.

Dixon's first act, upon being appointed manager of the business of the election for the respondent, appears to have been, the procuring the appointment of ward committees and opening the committee rooms, which he did upon the occasion of receiving the \$100 from the respondent in the first week in January.

These ward committees were nominated at a general meeting held at St. George's Hall, at which Dixon was present and took down the names of persons suggested as members of ward committees. The respondent, (as Dixon thinks), had nothing to do with the *calling* of that meeting.

We might presume, I think, if it was important, that it was called or procured to be held by Dixon himself, acting as the respondent's manager; but it is not alleged that the respondent was not present at the meeting, or that he was ignorant of what took place at it. The respondent did not himself name the members of these ward committees, but they were appointed at this meeting and their names subsequently advertised in one of the daily papers in circulation in the city. The respondent was in the habit of attending occasionally at least, if not frequently, at the ward committee meetings. He says he knew that there were committees appointed who were advancing his interest; and Dixon says that on several occasions he has heard the respondent caution the members of these committees not to be guilty of unlawful acts.

There can be no doubt that as regards such of the members of these committees at least as the evidence brings us into immediate intercourse with, the respondent was perfectly aware that they were appointed to act as members

of committee on his behalf, and that they were acting on his behalf, and he availed himself of their services as canvassers and otherwise; and he is, beyond all question, liable to be affected by their conduct as his agents.

There was no central or general committee, but there were committee rooms hired in Richmond Street by Dixon on behalf of the respondent, called "The Central Committee Rooms." Here Dixon as "the head man" (as he is called by Dr. Daniel Hagarty, himself a conspicuous actor in the transactions which the evidence brings to light,) was almost always in attendance, having under him eight or ten clerks, some of them voters, and two messengers, employed constantly in the business of the election during three weeks preceding the polling day.

At these central rooms the respondent also himself attended, at least twice a day.

Smallman also was constantly to be found here, coming in from time to time from canvassing for the respondent.

Reaves also, the respondent's other partner, was in the habit of attending here; and to these rooms, as we shall see, recourse was had upon all occasions when money was required for the purposes of the election by the numerous parties acting in canvassing for the respondent, and in controlling, managing, and executing all the business of the election.

As a rule, the persons in fact in attendance at these committees rooms may be said to have been the respondent himself, his two partners Smallman and Reaves, and his ostensible manager or head man Dixon; and on extraordinary occasions Mr. Dixon would summon the attendance of the most influential members of the ward committees.

Whether Smallman or Reaves were on any of the respondent's ward committees does not appear, but they interested themselves, especially the former, very much in his behalf, and canvassed for him.

The organization adopted to carry on the election for the respondent may be said to have been that Dixon as "head man," the respondent himself, and Smallman and Reaves

his partners, were daily in attendance at a room, called the central committee room, where some one or more of them could be and were found at all times as occasion required, and where eight or ten clerks were constantly employed doing the business of the respondent in promoting the election; and the city was divided into seven wards, each having a separate ward committee, acting as respondent's agents, at the meetings of which committees in their ward rooms the respondent from time to time attended.

He had then the fullest opportunity of observing, inquiring, and ascertaining daily what took place at the Central Committee Rooms, and in what business the clerks were there employed, and also of observing, inquiring, and ascertaining what business was transacted in the several ward committee rooms; and moreover, he himself made, as he says, a general personal canvass night and day throughout the city, so that he had the fullest opportunity of hearing and observing what was passing abroad outside of his committee rooms throughout the city in relation to the election.

Mr. Dixon says that he gave to one ward more than another, and to each according to what he thought would be right.

To Ward No. 1, he gave \$75, as sufficient, in his opinion, for the legitimate purposes of this ward.

One Robert Henderson was chairman of the Ward Committee.

Although Mr. Dixon says that he distributed this sum among "various members of Ward No. 1," it was most probably all given to this Mr. Henderson; for he says, among other moneys received by him, that he received from \$60 to \$75 from Dixon; and again he says: "the \$75 was for paying canvassers."

Henderson says that he was employed from the start: that he was chairman of No. 1 committee: that he saw the respondent occasionally, once or twice in the ward committee room, and that he also saw him in the general or central committee room: that the respondent knew that

he, Henderson, was canvassing for him, and that he was chairman of the committee No. 1. Henderson received \$775 for this ward, namely, \$700 in two sums of \$500 and \$200, *from Reaves in the committee rooms*, and about \$75 from Dixon. He distributed about \$600 among members of the committee, to do as they liked with it for electioneering purposes. Of this \$600, a part, namely, \$200, was given to one Campbell, a member of the committee, and for his own part, Henderson admits having given \$10 to the wife of one O'Connor to get her husband's vote. He says, "the vote was promised *to us*. I went. There was an opposite party agent there, who, she said, was offering money, so I gave her \$10 to get her husband's vote."

He says that after the election he gave to one McArthur \$10, he saying that he was out of pocket for his time; and to one Brown \$10, with whom he had been driving. He does not profess to be able to distinguish the moneys handed to him by Dixon, and estimated by him to have been sufficient for legitimate purposes within the ward, from the other moneys. All appears to have been expended much alike.

Campbell, to whom Henderson had given \$200 of the moneys received from Reaves, says he took an active part for the respondent, chiefly in Ward No. 1, the committee of which he was a member. This gentleman met respondent at the central committee rooms, and also on one night in No. 1 committee room. He used to see the respondent every day during the canvass, and used to talk to him about the election and what the prospects were; but, as he says, "he never talked to him about money at all." He also seconded the respondent at the nomination.

This gentleman, about a fortnight before the polling day, that is to say, about the 14th or 15th of January, received from *Smallman in the central committee room*, \$150, specially for the hackmen, which sum he gave to one Flaherty to give to seven or eight hackmen, whom he mentioned to be favorable to respondent, for the use of their hacks both before and at the polling. A few days after-

wards he got another \$100 from Smallman, *also in the central committee room*. The third sum he received was the \$200 through Henderson, \$100 of which he received a few days before the election day, and the other \$100 *about noon of the election day*.

Smallman would appear also to have been a party to the payment of one or other of these latter sums of \$100, comprising the \$200 coming through Henderson; for Campbell, when speaking of where he got these moneys says, "he got them *in the central committee room from Smallman, on three different occasions*."

Mr. Campbell acknowledges having disposed of about \$100 himself throughout the ward in bribes, "chiefly to women." He gives an example from which we may fairly judge of all the rest of his appropriations. He says: "I gave \$10 to a cooper's wife; her husband had a vote. I bought some candies and toys, and gave them to the children. I told her I wanted her husband to vote." And to explain why he adopted this mode of making the respondent acceptable among the wives of voters whom he wished to influence, he says that he had heard that Carling's friends were buying candies, and so he did the same. A fellow came to him, he says, and he gave him \$5. Then his wife came and said her husband had been canvassing for respondent, and that they were very poor, and so he gave her \$5. However the vote thus sought to be secured, "*voted against us*," as he says.

He adds: "*We* wanted people to vote for respondent, and *we* did not give money to those *we* thought would not vote *for us*." He spent also \$75 in some demonstration, from which beneficial results to the respondent were anticipated.

One John Boyle was also a member of No. 1 committee. He canvassed and voted for respondent. He received \$24 from Henderson, and the balance of a sum of \$91 or \$94, that is to say, \$67 or \$70, from Smallman. Of this sum, he spent \$66 in paying for teams hired for the polling day, according to a list with nine names on it, handed to him by Henderson; \$20 he spent in whiskey.

This witness also says that he offered money to several, but found that they had been offered more before he saw them.

So far, therefore, as this evidence goes, it appears to establish, that although Mr. Dixon considered \$75 sufficient, and therefore appropriated that sum for the legitimate purposes of Ward No. 1, there was in fact expended in it at the least \$1,092, and all this money was paid over by *Smallman or Reaves in the respondent's central committee room to members of his committee* in the ward, with the exception of the \$75, which was paid over by Dixon, and as would seem in the same committee room, where eight or ten clerks were employed in the transaction of the respondent's business; and yet, so far as we can see, there does not appear to have been any distinction whatever made between the moneys paid for legitimate and those paid for illegitimate purposes, or between those paid by Smallman and Reaves, the respondent's partners, and those paid by Dixon, the manager of the election business.

Mr. Dixon says that he set apart \$100 as sufficient in his opinion for the legitimate purposes of Ward No. 2. He does not inform us to whom this sum was paid, nor when; and we are unfortunately unable, from the evidence, to trace its application or to determine what sums were in fact expended in the ward, or to distinguish whether any, and if any what part of the moneys spoken of by the witnesses who have been examined, has relation to expenditure in this ward.

Mr. Dixon set apart and appropriated \$150 as sufficient for the legitimate purposes of Ward No. 3. He does not inform us to whom or when this sum was disbursed by him, nor can we, any more than in the case of Ward No 2, extract from the evidence what was the actual expenditure incurred in this ward, save in so far as the evidence of Henry C. Green, and Frederick A. Fitzgerald, and Dr. Daniel Hagarty may throw some light on these points.

Mr. Green is a lumberer, having from eight to twenty men in his employ. He does not know whether or not he

was on a committee, but he took an interest in the election for the respondent, and canvassed for him in Ward No. 3, and did what he could for him. He was often at the central committee rooms, where he has seen Dixon, Smallman, and the respondent; and he was many a night at the ward committee room when the committee met. He spent money several times when the committee met, and paid for the committee rooms once or twice. Something was said about paying, and he said he would pay. One night he paid \$5 or \$10 for the use of committee rooms. A day or two before the election he gave his cheque to some of the committee for \$75. This was the evening before the election, after the bank had closed. It was either at his own office or at the committee rooms that he gave the cheque. He thinks the cheque was to bearer, and he always destroys cheques to bearer. It was talked of that money was wanted for the election. He is satisfied that some of the committee got it. Witness was to get the money back. It was as much for himself as for the others, and it was spent in the election. It was for the use of himself and the committee about the election that the money was given. On the election day he got back as much as this \$75 from Smallman. He asked Smallman for money on the election day, and twice on that day he received money from him. The idea was that the money was to be spent on the election, and it was.

As to the manner in which he himself spent money, he said that he paid one man's fare on the cars from Stratford, who said he would come and vote if witness would pay his fare. Witness was told of this man at London, and as witness was going to Stratford, he said he would see him. Witness saw him, and asked him to vote for respondent. The voter did come down to London. Witness paid his fare, took him to the poll, and he voted for respondent. Early on the election day witness went out somewhere to get a man to vote for respondent. He was in bed and would not get up. Witness asked him to come and vote for respondent. He had hard work to get him

up. His wife was in the kitchen. Witness gave the wife \$3, and after bringing the man in he found he had no vote. Witness saw a wood train coming in; one Pete, a colored man, and others, voters, were upon it. Witness canvassed them. Pete said he would not vote unless he got \$25 or \$50. Witness says that he does not think he offered any of them anything to vote. This was the only answer that could be extracted from him to the question whether he offered anything to any of the coloured men to vote. On the election day he gave \$5 or \$10 to a man who asked him for it, saying he wanted it. He gave the money as the man could get some votes if he had it. Witness also often talked to Baylis, the barber, about the election, and bought candies from his wife at times. Upon the whole he says he may have spent \$50, more or less. He thinks he hardly spent \$100 on respondent's election.

Mr. Frederick A. Fitzgerald does not know whether he was on a committee or not; but he has been in the general committee room, and, although he was not assigned to any particular division, he took a somewhat active interest all over for the respondent. He was out ten or fifteen evenings canvassing for him. He was canvassing with others who were acting for respondent, and he met respondent several times, who, he has no doubt, knew that he was working for him. This witness spent \$200, or perhaps more, but not so much as \$300, in the respondent's interest, wherever he thought necessary. Of this sum he got \$100 from Smallman, who gave it to him a few days before the election, with instructions to handle it judiciously to the best of his judgment. Where he got the other \$100 or more he does not say, perhaps from Mr. Dixon.

The judicious use which he made of the money was in this manner: He employed a carpenter who worked in Green's sash factory to purchase votes. He gave him money whenever he wanted it; several times \$5 or \$10. He did not think a vote worth more than that. He

accounts for about \$50 as disbursed through this carpenter. The names of the voters to whom he was going to give the money were told to witness, and thereupon he supplied it for that purpose. Other parties before the election came to witness and said they were offered money to vote for Carling, and that if witness would do as well for them they would not vote at all.

It would seem, therefore, that it was well understood in public that this witness was acting as an agent of the respondent.

Witness says that he told these persons thus offering to him their votes for respondent, that if they would not vote he would satisfy them. Accordingly, after the election, one Parker, one of them, came and satisfied witness that he had not voted, and witness paid him \$10.

He thinks others came in like manner, but he cannot remember paying anyone else.

On the election day he gave one Murphy, a voter in Ward No. 3, \$10. Murphy had come to him before the election and said he was offered \$20 by Carling's party, and witness said that if he would vote for respondent he would pay him. Murphy, as witness understood, did vote for respondent, and he therefore paid him the \$10.

Upon the election day witness gave one Bennett \$20, which he said he wanted. Witness gave it because, he says, "I knew him as an active supporter and worker *on our side*."

On the election day, a wood train came in—some coloured men were on it. This is no doubt the train spoken of by Green.

Witness says of these men: "I tried to get their votes. I got this same carpenter to offer them what they would take for their votes. I sent this man to any I thought would sell their votes. The carpenter went down with us to the train. He went to them, and came back and said he could do nothing with them."

Witness says that some of the money that he spent was his own, but how much he does not say.

In so far as Ward No. 3 is concerned, Dr. Hagarty says, that on the day of election he gave to the wife of one Nolan, \$8 or \$10, to influence her husband to vote for respondent. He had canvassed Nolan, who seemed doubtful, and so witness gave the money to Nolan's wife; and Nolan, as witness thinks, voted for respondent.

Now, with reference to this ward, it is to be observed that Green is found to be occasionally advancing moneys in the committee room, and supplying members of the committee with money, which, in part, at least, would seem to be for expenditure which should have been incurred by Dixon, and should be charged against the \$150 set apart by him for the ward.

Smallman, who professes to give the names of all the persons to whom he gave money, does not mention having given Green any; yet Green, who had advanced moneys for the committee, which he expected to be repaid, and for repayment of which, according to his evidence, he would have had a right to sue the respondent to the extent that his advances were legitimate, receives on the day of the election from Smallman as much as \$75, if not more.

Under these circumstances, it seems but reasonable to infer that this sum paid by Smallman to Green was in satisfaction of the claim which he had against Walker, and against the fund placed under Dixon's control.

Connecting this with the evidence of Dixon, that he himself, in the middle of the week before the day of the election, received in cash from Smallman *the last* \$200 of the \$1,000 authorized by the respondent, to be placed under his control, it would seem to be a reasonable inference to draw, either that Smallman, notwithstanding his payment of the \$1,000 to Dixon, had control over its outlay equally with Dixon, or that Dixon had supplied this sum to Smallman out of the funds in his hands to pay Green; and if Smallman is in any way brought into connection with the appropriation of any part of the moneys professed to have been placed specially under Dixon's control, it gives rise in my mind, I confess, to a very grave doubt as to the pro-

priety of Dixon's conduct in the application of the moneys entrusted to him to disburse, which doubt the non-production of the books in which he kept the entries of his disbursements, is calculated to increase not a little. The amount of \$500, given by Smallman to Scandrett, who was a partner of Frederick A. Fitzgerald, (who was not examined) of the particular application of which we have no evidence, was probably expended in this ward.

Mr. Dixon says, that he expended upon Ward No. 4, two sums—namely, \$50 and \$25. The \$50 was given by him to one Atkinson, a member of the ward committee, in the central committee room, for the purpose of being handed by Atkinson to Philip Cook, chairman of the ward committee, and who received the money accordingly.

Cook thus renders an account of the moneys received and disbursed by him. He says he was chairman of the committee No. 4; that he acted for the respondent whom he met once or twice during his canvass, and who, as he says, he supposes knew that he, Cook, was his friend and in his interest. He received early in the contest \$50 from Dixon through Atkinson, and soon after, \$250 from Smallman or Greaves; and again another \$100 from Smallman; and out of these sums he paid for rent of rooms \$3. To McCue who was also a member of the committee, he gave \$50, for rigs, and to influence people for lawful purposes in the way of treating, eating, and drinking. He had told McCue that he would repay him anything spent for lawful purposes; and McCue having told him that he had spent that amount, witness repaid it to him. To George Hiscox, another member of the committee, and who was a livery stable keeper, he paid \$100 for four pairs of horses and drivers for two days; and he says that he may have given him a little more as they drove about. To one Corrigan, another committee man, who was, as he says, some kind of attorney, he gave \$25 for professional services, and \$4 of that amount spent by him in refreshments. To Joseph Atkinson, through whom the \$50 had been sent him by Dixon, he gave \$10. Besides the above sums, he paid \$10

to a woman named Fitzgerald, whose husband he heard had a vote. He supposed it would influence her husband's vote, and as he wished to win he gave her the \$5. To a boy named Carty, for a like reason, because his father had a vote, he gave \$5; and to a woman named Romboldt, to influence her husband's vote, he gave \$10.

Now, Mr. Dixon in his evidence has given us his idea of what was legitimate expenses, and for what purpose the money placed in his hands was to be disbursed—namely, for rent of committee rooms, refreshments, and expenses of getting buggies to go out canvassing.

We find then by the testimony of this witness, that he received from Smallman and Reaves, one or both of them, from \$150 to \$170, applied to the same identical purposes as the fund from which the \$50 sent to Cook by Dixon was provided for.

George Hiscox, besides the \$100 paid to him by Cook for teams, received from Smallman, in the central committee rooms, about two weeks before the election day, the further sum of \$50; and a few days before the election, from Reaves, at the office of Reaves & Co., in which firm he was partner, the sum of \$95. The \$95 was given for the purpose of giving \$30 to a Mrs. Murray, wife of Alderman Murray, for her to spend in *canvassing*, a term which he explains by saying that he considers treating, hiring horses, or paying for votes, would be expenses of canvassing. \$25 was for one Carver, a voter, for canvassing and expenses, but not for his own vote; and part of the residue was for money due by *respondent's party* to Hiscox himself, for money spent in saloons and taverns treating.

He paid also men for driving teams on the day of the election. He also gave to one Charlton \$5 for his vote.

Hiscox says that he canvassed generally for respondent, and took an active interest in his behalf, as he presumes the respondent well knew.

Doctor Daniel Hagarty was a member of committee No. 4. He appears also to have been a member of committee

No. 3, and one of the most trusted of respondent's agents.

Green says that Thomas Field, Dr. Hagarty, Charles Bennett, and Spettigue, were on committee No. 3.

The Doctor appears to have canvassed for the respondent in all the wards; for he says that he had canvassing books given him by Dixon, which the committees of each ward inspected.

He says that he took a very active part in the election on the respondent's behalf. He was about three weeks canvassing for him. He was in the habit of meeting respondent almost daily and talking with him, and would tell him how he was getting on; and he may have told him of the persons he had been canvassing. He often met him in his committee room—the central committee room in Richmond street.

Smallman, respondent's partner, witness says, was also active. Witness has seen him with the respondent during the election—that is, the canvass. He, that is Smallman, and the respondent went about canvassing together, but not much, as witness thinks; and witness has often met Smallman in respondent's committee room with Dixon and Reaves.

The first time that witness received any money for the purposes of the election was eighteen days before the election, that is to say, about the 11th of January. He then received \$120 in one sum from Smallman, for the purpose of paying, and which witness accordingly did pay, to one Brown, who kept a livery stable, to hire from 10 to 14 horses, which he had for the day of election. Out of moneys also received from Smallman, he paid to one O'Meara \$100, and to one Flaherty \$20, for the hire of teams in like manner for election day.

During his canvass he also received from Dixon, whom witness describes as secretary of respondent's committee and "head man," from \$40 to \$50. From Reaves he received \$250—in all about \$600; and all the moneys given to him by Smallman, Dixon, and Reaves, were given to him alike for canvassing purposes. He got the money to do

with it as his judgment dictated, and witness has told Smallman how he was getting on.

Of the \$250 above set down as received from Reaves, he says that he received perhaps \$200 on the day of the election; that he got *most* of it from Reaves, and in the respondent's committee room. He got money twice that day, morning and afternoon, and he thinks both sums from Reaves, he, Reaves, being the only person then in the committee room besides witness himself. Upon the whole, out of the \$600, witness paid from \$250 to \$300 for horse hire.

In the course of his canvass he canvassed one Rourke, who said he was going to vote for Carling. Witness thereupon offered him \$5 for a pair of chickens, which Rourke said he could not sell to him, as he had raised them for Dr. McKenzie. Ten or twelve days before the election he gave to a voter's wife in Ward No. 5 \$5 to influence the husband to vote for respondent.

About a week before the election, a man whom witness had seen in the respondent's committee room, and who was with witness when he was canvassing, advised him to give \$8 or \$10 to the wife of a voter in Ward No. 6, which witness accordingly did give to her to influence her husband's vote.

Out of the moneys received on the day of election, and which, as witness says, those who paid it were well aware of what he was going to do with it, he gave \$20 to a Mrs. Mason to influence her husband, whom witness had previously canvassed, and who was favourable to Mr. Carling, but had not decided how he would vote; and witness gave the \$20 to his wife to influence his decision. He, however, afterwards voted for Mr. Carling.

To a Mrs. Sheldon, whose husband he had also previously canvassed, and who said that he would vote for Mr. Carling, he gave \$25 to influence her husband's vote, and he voted for the respondent.

To the wife of a voter in Ward No. 1, in the afternoon of the day of the election, he gave \$16 to use her influ-

ence with her husband to vote for respondent, and witness took him down in a cab, and saw him vote for respondent.

To a Mrs. Connors, whose husband he had previously canvassed, and who had said he had not decided, he gave \$16, in the afternoon of the day of the election, to influence her husband to vote for respondent, and he did accordingly vote for respondent.

In Ward No. 7, on the day of the election, he gave \$15 or \$20 to one Patrick Brennan, who insinuated that he wanted something for his vote, and he thereupon voted for the respondent.

One John Hagarty, whom witness had canvassed, spoke favourably of Mr. Carling. Witness gave \$16 to his wife on the election day, to influence his vote; and he voted for respondent.

One Nolan, in Ward No. 3, when canvassed by witness, seemed doubtful; to solve his doubt, witness, on the day of the election, gave his wife \$8 or \$10, and he accordingly voted for respondent.

For the three weeks during which this gentleman was canvassing for respondent, he seems to have gone through the city treating wholesale.

In his own language, he must have treated nearer forty persons than one each day, for three weeks.

At the Revere House, Tecumseh House, Strong's, where the committee of Ward No. 4 met, and some of the smaller taverns, he has treated fifteen or twenty at a time.

This witness also paid one Reilly from \$10 to \$15 for taking charge of the central committee rooms, making fires, keeping the doors, &c.

So that, as I have said before, this gentleman appears to have been one of the most trusted, as he was one of the most active, of the respondent's agents.

Now, of these sums disbursed by Dr. Hagarty, the sum of \$240—namely, the amounts paid to Brown, O'Meara, and Flaherty for horse hire—may be said to have been sums which might properly have been charged against the funds said to have been placed under Dixon's control. They were not, however, charged against it.

We have then, besides the \$150 or \$170 paid to Cook, and the \$150 paid by Smallman to Campbell for the hackmen, and \$66 paid by Doyle for the like purposes, the sum of \$240; in all upwards of \$600 advanced by Smallman for purposes which the respondent contemplated providing for; and we find the greater part of these sums, if not the whole of them, provided by Smallman before he had paid to Dixon the whole, if not before he had paid to him any part, of the \$1,000, which he and Reaves were authorized by the respondent to pay to him.

So that it appears to be pretty well established, I think, that Smallman, at least equally with Dixon, had and exercised like control in disbursing on the respondent's behalf funds for purposes which may be said to be legitimate, and for which, if a promise to pay instead of the money had been given for the furnishing the teams, the respondent, upon the evidence of agency given here, could not have escaped liability.

No money was appropriated by Mr. Dixon for Ward No. 5.

Alderman Magee lived in Ward No. 5. There was a committee for the ward, but he was not, to his knowledge, upon it, or upon any committee. He attended, however, committee meetings in the ward, and has also been at the central committee rooms. He has seen the respondent in the central committee room three or four times. He canvassed for the respondent, and occasionally saw him, and talked to him of the election. He received about \$600 from Smallman, and \$300 from Reaves *at the central committee rooms* on Richmond street. Part of this sum was given to him to distribute to the committee of the Ward No. 5, for election purposes in that ward. He received no money at all from Dixon. The money so received for distribution among the members of the committee, he paid as follows:

To one Rose, a committee man and voter, who was working for the respondent, he gave about \$40. He supposes that Rose knew better than witness himself what to do with it.

To Patrick Gleeson, and other members of the committee, he gave \$30 to \$40.

To Thomas Brown, who was working for the respondent, he gave from \$10 to \$15, or perhaps more.

To Lewis Stein, a cooper, he gave \$400. He knew that Stein was going to Cleveland, in the State of Ohio, to bring over some coopers who had votes, and he gave him the \$400 for that purpose.

He gave some money to Walter Fairbairn. To Adam Wheaton, who was active for the respondent, he gave \$20,

To one Fysh, he gave about \$50.

Thus of \$900, given to him by Smallman and Reaves, he accounts for only about \$560, for *after the election he burned his memoranda*; but, he says, he used very little himself;—that he gave the money to different committee-men, and that he may have spent a little in whiskey. He thinks that the respondent was aware both that he himself, and the people to whom he gave the money, were active for the respondent. He received the money, and paid it out for election purposes; but what he understands by the term “election purposes” he does not explain.

Joseph Broadbent is a builder, employing about fifty men. He was not on any committee, but he canvassed for respondent. He went into Ward No. 3 *with respondent to canvass* for him, four or five days before the election.

On the day of the election he was driving down the street, when one Englehart came to him, and asked him about the election, and if he wanted any money.

He replied that, “money at this time might come in.” Parties, he says, were just then wanting \$25 to vote for Carling. He accordingly appears to have gone to the respondent’s committee rooms to get some money; for in that committee room, between 3 and 4 o’clock, he received the required funds, about \$100, from, as he says, Englehart; and being thus supplied, he returned and got the men who wanted \$25 to vote for Carling, to vote for the respondent. There were also two men working for one Beatty, “*whom*,” (in the language of witness) they said, “I

could not get." I said to the men, "I want you to vote for respondent." I can't say how much I gave them; perhaps \$10 or \$15 each, and I got them to vote for respondent." Witness saw the respondent that day. He does not know who supplied the money which he got, but it was handed to him in respondent's committee room by Englehart, who resides at New York, and who happened to be at London on the day of the election.

In this Ward No. 5, then, we find that no money was provided by Dixon at all, but we do find money supplied by Smallman and Reaves to the members of the ward committee for all purposes, both legitimate and illegitimate; and all the moneys of which we have any mention as being disbursed in the ward, were furnished at the respondent's headquarters, the central committee room, and some of it for the express purpose of bribery.

Mr. Dixon says, that he appropriated \$150 for Ward No. 6; to whom he gave it, or when he gave it, does not appear. We have, in the evidence, an account of this precise sum of \$150 from James Fitzgerald, one of the members of the ward committee, but it was given to him by *Smallman in the central committee room*.

The witness says that he was on the committee of the ward: that he took an active interest for respondent: that he canvassed for him during three weeks before the elections; and that he has no doubt that the respondent knew he was canvassing for him. He made his returns to the ward committee, and he was often at the central committee room, where he received the \$150 from Smallman in two sums, one of \$50, about two weeks before, and the other \$100 the day before the election. Witness told Smallman that he wanted the money, and Smallman thereupon gave it. The money so given to witness he divided for the most part among twelve members of the committee. He spent about \$50 in treating, and he gave to a voter's wife \$5 to get her husband's vote.

If the sum spoken of by this witness be the same sum that Mr. Dixon appropriated for the ward, then it is plain

that Smallman, equally with Dixon, had control over the disbursement of the moneys ostensibly placed under Dixon's control; and if it be not the same, but a different sum, then it is plain that Smallman, equally with Dixon, disbursed moneys for respondent among the members of his ward committees, precisely in the same manner, and for the like purposes as Dixon was authorized to do,—Dixon's exercise of control, which was left wholly to his own discretion, having in fact consisted in his giving the money to some members or member of the ward committees for distribution among the members, to be used by them for election purposes.

Besides these several witnesses, whose evidence I have been able in some measure to apply to the respective wards, there are others who give evidence which I cannot so apply.

Marvin Knowlton was a lumberer, having upwards of ten men in his employment. He was nominated, but declined to act upon any committee. However, he took an active part for the respondent, and for more than a fortnight before the election, he worked all around for him. The respondent knew that he was canvassing generally for him. He saw respondent almost every day. He would ask witness about some particular voters.

Witness's influence was chiefly among the temperance men; and respondent came to him to speak to him about certain temperance votes. Witness went with him to the Phoenix foundry; and also to the Great Western Railway, to see voters, and also, if I mistake not, to the refinery of Waterman, Englehart & Co., where the respondent canvassed John S. Robinson, the foreman of that establishment. About a week before the election, this Robinson came and told witness that he had much influence with certain voters, and that he would like to get \$500. Witness reported this to Reaves, who told him to let Robinson have the money. Accordingly witness advanced to Robinson the \$500. Witness expected to be repaid this sum. Reaves also authorized witness to advance \$50 to one Platt, who

said he wanted it for election purposes : and \$50 to one Thompson, a partner of one McClary, for like purposes. Witness also paid one McCullough, a voter, \$26 or \$36, for horse hire, and \$10 to another person not a voter, for driving a team. These two last sums appear to be sums properly payable out of the moneys said to have been entrusted to Dixon.

Now, all these sums so advanced by witness were repaid, by \$500, paid to witness by Smallman in the central committee room, a few days before the election, and \$200, paid by Reaves ; and the balance of the \$700, not above accounted for, was spent in small sums, but for what purpose is not stated.

This witness says that Reaves was a prominent man in the election ; and we have here Smallman reimbursing witness moneys which he had advanced upon the authority of Reaves, and which witness expected to be repaid ; Smallman thus recognising the acts of Reaves, performed by him in the interest of the respondent.

Robinson, to whom Knowlton gave the \$500, says that, although he was not on any committee, he took an interest for respondent and canvased for him, chiefly among men working in the oil refinery. He hired men to work to get votes for respondent. All had agreed to vote before he gave any money. He told them he would give nothing for their votes before the election. He had promised some \$10, some \$20, to get them to work for the respondent ; but if they did not vote for respondent, he did not think he would have given them anything, for they would have done nothing for their money. He told them that he would see them after the election and give them a present, but that he would give them nothing for their votes.

He says that he made his contract with Knowlton, who asked him what he would take to work at the election among the refiners. He replied that he would not work for less than \$500, which sum Knowlton gave him, and he disbursed thereof \$300, as above described, after the election, to persons who had voted for respondent ; and \$200.

he retained for his own trouble ; however, he also gave his vote for respondent. On the election day he talked to respondent, and asked him how he was getting on ; and he replied *that "they were hounding him for money, and he would not give them a cent."*

William Thompson, to whom Knowlton, by Reaves's direction, gave \$50, says that he canvassed for respondent, and that he has no doubt the respondent knew that he was working for him. Besides the \$50 received from Knowlton, he received \$100 from Smallman, and \$30 or \$40 from Reaves. Some of this money he spent in saloons ; some he gave to voters. He gave Edward Bilton \$25, for spending money, and to his wife he gave \$50, which he told Bilton he was going to give her to make him vote "for us." To one Smith he gave over \$30, to induce him to vote for respondent. To Alex. Thompson \$10, to get him to vote for respondent. To the wife of one Carty \$10, to get her to influence her husband to vote for respondent. To one Wilson he gave from \$15 to \$20 ; Wilson had said that he had been offered \$25 to vote on the other side, and witness says, "I told the old man that if he voted for us I would make it right with him. He did vote for us, and I paid his son."

This is the substance of the chief evidence given at the trial, and it discloses, to my mind, such an amount of general corruption pervading the whole election contest, that I should have to hesitate long before I could say that in my judgment the election should not be declared to be void for general corruption, even if no evidence whatever had been offered of agency so as to affect the respondent, upon the principle stated by Willes, J., in the *Guildford case*, 1 O'M. & H. 15—namely, that general bribery, though not traced to the candidate or his agents, will avoid an election, because it would shew that there was no pure or free choice in the matter, but that what had occurred was a sham and not a reality.

But that agency has been brought home to all persons proved to have been guilty of bribery in this case, there can be no doubt.

All the members of the ward committees, and all others who, though not on committees, acted as if they were, and canvassed for the respondent with his knowledge and consent, and who appear from the evidence which I have summarised, to have given bribes, are established by most conclusive evidence to have been the respondent's agents. And as to Smallman and Reaves, the former of whom not only canvassed for, but it would seem occasionally at least *with* the respondent, the only conclusion which the evidence warrants us in arriving at is, that they, Dixon and the respondent himself, are the only persons who had charge of the central committee room, directing, controlling, and managing the election from thence as the respondent's head quarters.

Indeed, no sooner had Dr. Hagarty, Green, and Frederick A. Fitzgerald given their testimony than the respondent himself, by his counsel in open Court at the trial, admitted that sufficient had been proved to avoid the election.

Upon what principle he can claim now to be heard appealing upon the ground that the election should not have been declared to have been void, but that the petition against his return should have been dismissed, I am unable to understand.

If upon this evidence the question necessary to be determined was, whether the moneys disbursed for the corrupt purposes which the evidence discloses were or not the very moneys of the respondent supplied by him for the purpose, I should have very great difficulty in arriving at the conclusion that they were not.

For, in the first place, there does not appear to have been a general fund subscribed by persons taking an interest in the election, as is sometimes the case when an election takes place between rival parties. The candidates were not the representatives of rival parties. The respondent, who was opposing the former member, had been at the two previous elections his warm supporter. The respondent was not a member of the Reform Association, nor did that Associ-

ation contribute a farthing towards his expenses. The respondent was himself reported to be wealthy, and to be well able to bear the expense of the contest. So also was his opponent.

From the very start it seems to have been expected that the contest would be carried on at the expense of the candidates themselves. The respondent sought no pecuniary aid, and probably would have spurned the idea of seeking pecuniary aid from his friends.

His most intimate friend and legal adviser, Mr. Edward Harris, and with whom he was in the most intimate communion daily during the three weeks preceding the election, telling him of the progress of his canvass, says that, "he heard that it was likely to be an expensive election on both sides; that both the candidates were wealthy, and it was in the atmosphere that much money would be spent on both sides."

On the morning of the day of the election, Reaves went to him, and told him that Carling's friends were spending \$2 and \$3 for the respondent's \$1.

Mr. George B. Harris, brother of Edward, and who was constantly at the respondent's committee rooms, hearing what was going on, formed the opinion, and so told his brother that the election could not go on without money; in his modest calculation he made an estimate that it would cost respondent \$5,000. He suggested, indeed, that he would be willing to subscribe \$1,000, but he never did subscribe anything.

The respondent himself says, that he had good reason to believe that money was being spent corruptly against him. He had put on men to watch, and so ascertained the fact. He saw it stated by Mr. Carling in the papers that he, the respondent, had promised to spend money. This is the only *specific* charge that he saw, and he does not say that he denied it, but *there were besides general statements made that money was being spent*. He heard of the coopers having been brought over from Cleveland to vote for him, but he professes not to know who paid their ex-

penses, and he seems to have thought it prudent not to enquire, lest perhaps he should know. Indeed, he says that he never asked any of his supporters if they spent any money on his behalf. He was every day at his own headquarters, and saw Smallman daily, but he never discussed financial matters either with him or Dixon, not even to ask the latter if he had sufficient funds.

Then we find that the very first moneys which were disbursed through those trusted agents of the respondent, Dr. Hagarty, and his seconder, Mr. Campbell, to secure the hackmen, were paid to them expressly for that purpose in the respondent's head-quarters by Smallman, the person whom, together with Reaves, the respondent had directed to advance to Dixon \$1,000 out of his partnership moneys under their control, and to whom he had referred Dixon to get the \$1,000.

Dr. Hagarty, in explanation of his expenditure in bribing, says that he paid the money, hearing that the opposite party were doing the same.

Nearly all the money which is shewn to have been expended on the respondent's behalf, seems to have come through these two gentlemen, Smallman and Reaves, who were not only the respondent's partners, but who, both or one of them, were or was to be found at the respondent's head-quarters on all occasions whenever money was wanted, always ready to supply the want, less than \$200 being traced as coming direct from Dixon.

When Dr. Hagarty wants money for the wholesale corruption which he appears to have practised in the respondent's interest, he gets it at the central committee room from Smallman, Reaves, and Dixon, but least of all from the last.

Campbell, the respondent's seconder, receives what money he requires at the same room, *three* different times from Smallman.

There also Alderman Magee receives \$600 from Smallman, and \$300 from Reaves.

There also James Fitzgerald received \$50, a couple of

weeks before the election, and \$100 the day before the election ; both sums from Smallman.

There also Henderson, the chairman of No. 1 committee, received \$700, in two sums, on two occasions, from Reaves.

When Knowlton wants to enter into a contract with Robinson, he consults with Reaves, and being authorized by him, advances the money himself, which he expects to get repaid ; and when he wants to get the money back, he goes to the central committee room, and there receives the amount, \$500, from Smallman ; and having afterwards need of a further sum to expend in the respondent's interest, he goes again to the committee room and gets \$200 from Reaves.

When Broadbent (who went into Ward No. 5 canvassing *with* respondent), at a critical moment in the afternoon of the day of the election hears that voters are demanding in the street \$25 to vote for Carling, he goes to these committee rooms, apparently with Englehart, who resides in New York, and there the required sum to enable him to purchase the greedy voters, and to get them to vote for the respondent, is given to him through the hands, he says, it is true, of Englehart ; but this, as it seems to me, is of little consequence, for the natural presumption is, that the money was not Englehart's, but that it was furnished like all the other sums, by persons there for that purpose, on behalf of the respondent ; and surely the respondent should reasonably be held responsible for what was done in his interest, at his own head-quarters, the business transacted at which he should have been able to keep under his complete control.

Then it appears that all the books of the respondent's agents, containing entries of the results of their canvassing, and of the moneys disbursed by them, were all destroyed as soon as the election was over. None at least are forthcoming. Magee burned his, Smallman destroyed his, and Dixon cannot find his. Nay, even the work at which the respondent employed ten clerks for three weeks, at his headquarters, is destroyed, or withheld.

This destruction of the books is a fact which is open to

the gravest suspicion, and would warrant inferences most unfavourable to the respondent. Indeed, it seems fairly to justify the conclusion that an honest election was not in the contemplation of anyone.

Now, if Smallman and Reaves had themselves advanced all the moneys, without the aid of Harris, and if upon an account having been taken between them and the respondent of their partnership dealings, they had made a claim for these moneys as disbursed by them on account of the respondent at his instance out of his interest and share in the partnership moneys under their control, the respondent, upon the evidence of agency established here, would have found it difficult, as it seems to me, to have contested their claim.

Nay, if Mr. Harris himself, who, as appears, was indebted to the respondent in the sum of \$10,000, had claimed a set-off against this sum for the moneys paid by him to Smallman and Reaves, as having been paid to them as respondent's agents for the purposes of his election, it appears to me that upon the evidence of the agency of Smallman and Reaves, which is established here, the respondent would have found it difficult to have resisted that demand. And if these claims could have been successfully asserted, although in the turn which things have taken they are not now asserted, still if they might have prevailed if they had been asserted, seeing that their non-assertion may be solely for the protection of the respondent in this contest, it certainly appears to me that we should hold that the proper inference to draw from the evidence is, that the moneys were in truth the respondent's moneys, notwithstanding that Harris says that he has no claim on respondent for any of the money which he advanced, and notwithstanding the statement of the respondent that he feels no obligation and has no intention of paying Harris back any money he has advanced.

As to obligation, there may be no legal one, and indeed as to paying back there may be no necessity, and as to respondent's intention, that is a thing which he may have

changed since he gave his evidence, or which, if not already changed, from a sense of moral obligation, he would most probably find it desirable or necessary that he should change in deference to the moral sense of the community, in case he should come forward again as a candidate for the suffrages of the constituency.

If, therefore, the evidence, irrespective of that of Harris, would warrant, as I think it does, the inference that the moneys expended were the moneys of the respondent, provided in the round-about manner in which they were provided, for the purpose of endeavoring to avoid detection, I think it would be but reasonable, and in the interest of morality, to draw that inference; and if the question necessary to be decided now was whether or not this was the real state of the case, I should feel, I repeat it, a very great difficulty, indeed I may say an insurmountable difficulty, in arriving, as a juror, at any other conclusion than that it was; but fortunately it is not necessary for me to solve this difficulty, for to affect the respondent personally it is sufficient, in my opinion, if it be established to our satisfaction that general bribery was committed by his agents with his knowledge and consent, although it be literally true that he was ignorant of, and perhaps studiously kept in ignorance of, each and every particular instance of bribery committed by them.

In the *Salford case*, 1 O'M. & H. 138, Martin, B., says: "If the bribes were given with the privity of the member, * * it would be the same thing as the member himself bribing." And at page 139, he says that if it can be proved that there were a great number of acts of bribery done, so as to induce one to come to the conclusion that in point of fact they were paid with the privity of the member, hanging back and avoiding taking any part in them in order that the bribes might be given, that will affect personally the party so acting.

Now the simple question being, whether or not bribery was committed by the respondent's agents with his knowledge and consent, that question must be determined as

well by inferences drawn from facts actually established affirmatively, as from the destruction or withholding of evidence which ought to be in the respondent's possession, and which ought to have been, but was not, produced by him; and the only natural and rational inferences to be drawn from the evidence in this case (and these inferences come with such strong presumption as, to my mind, to be incontrovertible), appear to me to be :

1. That throughout the contest the agents of the respondent, acting on his behalf in promoting his election, were impressed with a strong conviction that in order to ensure the respondent's election it would be necessary to expend a very considerable sum of money in bribing some voters to vote for respondent, and in bribing others not to vote for his opponent; and that the respondent himself was impressed with the same conviction.

2. That, influenced by the pressure of this conviction, dozens of those agents of the respondent did commit acts of bribery upon a very extensive scale, with the knowledge and consent of the respondent, for the purpose of promoting his election, although the respondent may have been, and very probably was, kept in ignorance of each single particular instance of such acts of bribery. That corruption should have prevailed and that bribery could have been committed upon the extensive scale, and in the open manner which the evidence discloses throughout the whole contest, and that the moneys with which this bribery and corruption were consummated should have been almost all disbursed at the respondent's own headquarters, and that he should have been constantly in and out at these headquarters and canvassing, as he says, throughout the city night and day, and be ignorant that acts of bribery in his interest—acts from which he alone could derive any benefit—were being constantly committed by his agents, is, to my mind, utterly incredible. I do not seek for any reported case to support the principle upon which I proceed. It requires only the honest application of the common sense of a conscientious juror, to lead me to a conclusion upon

the matters submitted to me in this case. I can as readily believe it possible for the respondent to have been immersed in the lake and to be taken out dry, as that the acts of bribery which the evidence discloses to have been committed on his behalf, almost under his eyes, in his daily path, with means of corruption proceeding from his own headquarters, and from the hands of his confidential agents there, could have been committed otherwise than with his knowledge and consent.

I must yield to the only natural, rational, and irresistible inference which the facts established do, in my judgment, warrant.

Indeed, if the respondent could be declared not to be personally affected by the acts of corruption which have been established in this case, the Act of Parliament would be a dead letter, and the courts of justice would be utterly powerless to correct or check this monstrous evil.

As the whole case is now before us, and the judgment to be pronounced is such as in law and in fact should have been delivered by the learned Chief Justice at the trial, that judgment in my opinion should be that a certificate should be transmitted, as the act directs, to the effect and in substance as follows, namely :

1. That the said John Walker was not duly returned and elected at the late election of the city of London, to represent the said city as a member of the House of Commons.

2. That the election of the said John Walker was, and is declared to have been, void, by reason of divers acts of bribery committed by the said John Walker by and through his agents at the said election, and with his knowledge and consent.

3. That the said John Walker did use and employ means of corruption at the said election to procure his election, by his agents authorized by him to procure his election at the said election giving divers sums of money, with the knowledge and consent of him the said John Walker, to divers electors at the said election, with intent to corrupt and bribe such electors respectively to vote for the said John Walker at the said election.

4. That corrupt practices have been proved to have been committed by and with the knowledge and consent of the said John Walker at the said election, which corrupt practices consisted in the bribing of divers electors at the said election by the agents of the said John Walker, with his knowledge and consent, to vote for him the said John Walker at said election.

5. That Dr. Daniel Hagarty, Henry C. Greene, Frederick A. Fitzgerald, John Campbell, Joseph Broadbent, James Fitzgerald, John Doyle, Robert Henderson, George Hiscox, Marvin Knowlton, William J. Thompson, John S. Robinson, Philip Cook, John J. Magee, Thomas H. Smallman, George Reaves, and Edward Harris, have been proved to have been guilty of corrupt practices; and further, that corrupt practices have extensively prevailed at the said election.

And the Court doth order that the said John Walker do pay to the petitioner all the costs of the said trial, and of his own appeal; and that Pritchard's deposit be returned to him, and that each party pay his own costs of his Pritchard's appeal.

I have only a word to add with reference to the finding of the learned Chief Justice. In his judgment given at the trial, he says: "Actual ignorance of the prevalence of bribery in this case can only be preserved by a wilful and determined resolution to be and remain ignorant; by a studious and systematic refusal to listen to anything he hears as to the expenses of the election; by insisting upon the subject being always a forbidden subject of discussion; by shrinking from it, and averting the eyes from it whenever it appeared to be coming to the light; and by a tacit, if not an express understanding between all the instruments of corruption, that the party chiefly interested should be kept in ignorance of the wickedness that was being daily practiced. I am compelled to conclude that only by the most rigid adherence to such a stringent system could the respondent be able, with literal truth, to make the statement of innocence that he has made before me."

Now, I confess that this finding (with which, in so far as it suggests what must have taken place at this election no one can, I think, find fault) does appear to me to be condemnatory of the respondent. Indeed, I do not think that this conclusion of the learned Chief Justice differs much from that which I have myself already arrived at—namely, that the pre-arrangement or understanding, tacit or express, between the parties was, that the respondent should be kept in ignorance of the particular, separate, and distinct acts of bribery committed, while he was aware, as he could not but be upon any rational principle, that corruption and wickedness upon a most extensive scale were being daily practised around him, on his behalf, and in his sole interest.

If we assume an understanding that a party should be kept in ignorance by his agents of wickedness that was being daily practised by them, that seems to imply *a knowledge of the fact of the wickedness being practised*, and of its character, although the party should be kept in ignorance of the particular acts; and in the case of such an understanding being arrived at, the principal must, as it seems to me, assume the responsibility of all the acts of his agents, whatever they may be, the very compact that he shall be kept in ignorance implying an authority to commit the offence in the abstract, conditional upon the agent keeping the principal in ignorance of the particular instances.

HAGARTY, C. J.—I may assume the matter to be before us in a position similar to that of a case tried at Nisi Prius by a Judge without a Jury. The Court may pronounce such judgment on the law and evidence as they think right, and the Judge who tried the case appears to stand in the same position as the members of the Court who hear it for the first time in term.

I stated at the trial as follows: "With a larger measure of doubt and hesitation than I remember to have troubled me during a long legal life, I have come to the conclusion

not to report the respondent as personally guilty of the abominable and shameless conduct that has disgraced the last election for this city." I also stated that "actual ignorance of the prevalence of bribery can only be preserved by a wilful and determined resolution to be and to remain ignorant."

Since the trial I have had the advantage of hearing a very full and able argument of the case by eminent counsel, and have also devoted a large portion of my own time to an examination of the authorities, and the legal aspect and bearing of the evidence, and I have also had the benefit of a most searching analysis of the evidence prepared by my brother Gwynne.

I must shortly glance at the Statute law. The Controverted Elections Act directs the Judge to report whether any corrupt practice was proved to have been committed with the knowledge and consent of respondent. But if such report be unfavourable to him the statute provides no personal disqualification, nor does it in terms declare for what cause an election shall be avoided.

The only guide we have on that head would seem to be the common law of Parliament and sec. 18 of the Election Act, 36 Vic. ch. 27: "No candidate at any election shall directly or indirectly, employ any means of corruption by giving any sum of money," &c. "And if any representative returned to the House of Commons, is proved guilty before the proper tribunal of using any of the above means to procure his election, his election shall be thereby declared void, and he shall be incapable of being a candidate or being elected or returned during that Parliament."

This clause is copied from the Consol. Stat., C., ch. 6, sec. 82, which again is taken, in substance, from 12 Vic. ch. 27, sec. 54. Thus for nearly twenty-five years it has been the law in force.

The 49 Geo. III. ch. 118, (Imperial), says, that if any person, either by himself or by any other person for or on his behalf, give, or cause to be given, directly or indirectly, &c.

5 & 6 Vic. ch. 102, sec. 22, as to treating, says, that every

candidate who shall, by himself or by or with any person or in any manner, directly or indirectly, give, &c.

The Imperial Statute of 1854, 17 & 18 Vic., ch. 102, sec. 2, says: "Every person who shall directly or indirectly, by himself, or by any other person on his behalf, give," &c., "shall be guilty of bribery."

Sec. 36 says: "If any candidate * * shall be declared by any election committee guilty, by himself or his agents, of bribery, * * such candidate shall be incapable of being elected or sitting in Parliament for such county, city, or borough during the Parliament then in existence."

I am of opinion that a candidate comes within the disqualifying provisions of our statute of 1873, if it be proved that his agents, to whom the conduct of his election had been committed, were, with his knowledge and consent, bribing persons to vote for him—that in such case he is to be held to be using means of corruption to procure his election.

Bribery by his agents without his knowledge and consent does not, I consider, bring him within the clause.

I also think that if he be aware that his agents are so bribing, his assent thereto must be assumed from his non-interference or objection, he having the opportunity so to do.

I also think that it is unimportant whether the money so used in bribery be supplied by him or on his credit, or be wholly supplied by the agents themselves, or by others.

I am also of opinion that it is not necessary to connect the candidate with any particular act of bribery or to prove his knowledge thereof. This would probably be necessary if he were indicted for bribery. To come within our Statute I hold it sufficient to shew a knowledge of and assent to the fact that the agents were using and practising bribery to procure his election.

A candidate may, without much difficulty, keep himself clear of connection with any particular case or individual—he may leave all the dealings with corrupt voters to equally corrupt agents, and may be able, at any time, to

declare on oath, that he was wholly ignorant of any act of bribery or corruption altogether.

But when he is shewn to be aware that corrupt means are being used by his agents to procure his election, he is then, I have no doubt, in the words of the clause, "using those means to procure his election."

According to the usual principle on which we construe Statutes, I think we cannot hesitate to say that its language fully warrants this interpretation.

That the election was void in consequence of bribery by agents, admits of no question; nor that the persons found to have bribed, were agents for whose acts the respondent must answer.

The appeal of the respondent may be at once dismissed.

For the petitioner it was strongly urged that if he were ignorant of the practice of bribery, he was wilfully and purposely ignorant; and that wilful blindness amounts in law to notice.

The subject of notice, actual and constructive, is discussed in *Kerr on Fraud*, 177, and some excellent remarks are cited from American authorities, in addition to copious references to our own cases.

Sugden on Vendors and Purchasers, 14th ed., 755, fully discusses the doctrine: "Constructive notice, in its nature, is no more than evidence of notice, the presumptions of which are so violent, that the Court will not allow even of its being controverted."

In *Whitbread v. Jordan*, 1 Y. & C. 303, Alderson, B., says, at page 328, "When a party, having knowledge of such facts as would lead any honest man, using ordinary caution, to make further enquiries, does not make, but on the contrary studiously avoids making such obvious enquiries, he must be taken to have notice of those facts which, if he had used such ordinary diligence, he would readily have ascertained. He is not, indeed, bound to use extraordinary circumspection; nor, on the other hand, do I apprehend it to be necessary to make out express fraud on his part. If he be grossly negligent in omitting to inquire, it is at all events quite

sufficient to fix him with notice. * * Upon the whole I think this is such gross negligence as would be a cloak for fraud, if permitted."

Commenting on this case, Lord Lyndhurst, C., says, in *Jones v. Smith*, 1 Phil. 244, at p. 255, "In short, there was wilful blindness. That was evidently the impression on the mind of the learned Judge, but he said that even if it were not so, the facts of the case were such as to amount to negligence of so gross a nature that it would be a cloak to fraud if permitted."

Lord St. Leonards considers the decision in *Whitbread v. Jordan* to have gone too far on the facts.

In the often cited case of *Kennedy v. Green*, 3 M. & K. 697, Lord Brougham, C., says, at p. 709, "The doctrine of constructive notice depends upon two considerations; first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know and himself perhaps profit by that knowledge. In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not."

It must of course be borne in mind, in referring to this doctrine, the difference between fixing a man with notice to deprive him of the protection awarded to a purchaser without notice, and rendering him liable to some personal disqualification.

In *Bayntun v. Cattle*, 1 M. & Rob. 265, the candidate sued his election agent to recover back moneys. The agent shewed various payments to a large amount for conveyance of voters, and payments to voters, under the guise of Christmas boxes. The defence was, that the candidate

knew of these payments and assented to them, and certain expressions of his to the effect that his agent was too niggardly were proved, and that he wished the election carried on with more spirit and expense, and that he wanted to be at the head of the poll, cost what it would.

Alderson, B., said to the jury, at p. 268, "Looking to all the facts of the case,—the letters written by the plaintiff," (the contents do not appear) "and the expressions used by him during the election,—you are to say whether the plaintiff did or did not know that these illegal practices were resorted to for the purpose of carrying his election; or whether he did or did not subsequently assent to them when brought under his observation, for such subsequent assent would be equal to a ratification of the whole proceeding. If this should be your opinion your verdict must be for the defendant, otherwise for the plaintiff."

Felton v. Easthope, in the sittings after Trinity term, 1822, before Abbott, C. J., is not reported that I can find. It is cited in Rogers 11th ed., p. 364 as copied from MS. notes of counsel, and also in the *Dungarvan* case, 2 P. R. & D. 330. This extract is given: "It was perfectly true, if an agent who may be employed for various purposes, to canvass, &c., does, without the knowledge, privity, or approbation of the principal, promise a sum of money, the principal is not liable to be sued under this Act for the penalty. No person is liable to be sued for that penalty, unless that which was improperly done was done by his authority. If an agent bribes voters, with or without the knowledge and direction of the principal, it will void the election; the principal is to that extent liable, but not so in an action of this sort. It must be proved to be done *with the knowledge and authority of the principal*."

We have references to several cases in which it appears to have been left to the jury to find whether acts of bribery, &c., had been committed with the knowledge or privity of the candidate. Unfortunately we cannot find any full report.

The fullest reference I have seen is in the elaborate

judgment of Sir J. Napier, Chairman of the Dungarvan Election Committee, 2 P. R. & D. 324.

The standing of the Chairman, once occupying the position of Chancellor of Ireland, and at present a Lord Justice in Appeal, lends great weight to his opinion.

The case before him, however, was not one like this, of the general effect of evidence. It was sought to shew the disqualification of respondent in consequence of something done at a prior election. A petition was presented charging him at the first election with bribery, treating, &c.

It was charged that a corrupt compromise was entered into resulting in the withdrawal of the petition: that the bribery and treating were acknowledged by respondent, and were notorious in this borough. Hardly any evidence was offered as to the specific acts, so far as the report shews. The judgment states that the evidence fails to shew that the acts proved were committed with the privity of respondent, who, moreover, negatived on oath any authority, approval, adoption, or knowledge of them.

In the celebrated Crickdale case, with all its penal actions, the most distinguished members of the bar were concerned, and a learned and eminent judge, Mr. Justice Buller, presided on several of the trials.

The issue, by common consent, involved the privity and authority of the defendant.

Mr. Justice Buller puts to the jury whether the person who gave the money in bribes was employed to distribute it on behalf of defendant. This part of the case, he says, must depend upon the defendant's own acts; and, again, he says: "The criminal acts of one man cannot affect another, unless he, by his own act, approves of and adopts them."

So on another trial of one of these penal actions, this, most accurate and learned Judge says, that he should state the evidence to shew that what was done by the agent, was done by the consent and with the knowledge of Mr. Petrie.

This privity, might in many cases, be satisfactorily col-

lected from the general evidence ; but it seems to be a matter and conclusion of fact for the jury or a committee to be satisfied of the privity of the defendant.

This view of the law is still more forcibly urged by Mr. Baron Perryn, in another of these cases. After urging that the offences should be brought home to the accused, he says that, though the promises had been made by the parties who acted as the agent, "if Mr. Petrie was ignorant that any such promises had been made, he was not to be made criminally answerable for the consequences."

He treats the statutable penalty as annexed to a criminal offence ; and where the statute speaks of bribery by a candidate, or any person employed by him, this is to be taken to mean a person acting on his behalf with his consent, connivance, or knowledge, in the commission of the offence. This leaves the offence exactly as it stood at common law. He then cites *Felton v. Easthope*, already noticed. He also cites *Bayntun v. Cattle*, also noticed before.

He proceeds : "In the enquiries before committees, the general evidence on the whole case frequently raised an inference of privity or connivance on the part of the candidate, which was not repelled by positive contradiction ; but the practice of committees does not seem to have been regulated by any deliberate and settled view as to the true and uniform construction of the law."

As to the word "knowingly," he says : "It implies a full, a guilty knowledge of the offence." This remark is made in the introduction of this word in 5 & 6 Vic. ch. 102, sec. 22, as to corrupt treating, "knowingly allow to be given or provided."

"The word would seem to make it necessary that the candidate should be privy to the unlawful act and the corrupt purpose."

On this, as to corrupt treating, he proceeds : "The question is simply and exclusively one of personal disqualification, and nothing else ; and therefore it is to be dealt with, and the case of the accuser made out, as if we were pro-

ceeding on an indictment against the sitting member for an offence against the statute."

After commenting on the evidence, and pointing out its insufficiency, he says: "The sitting member has, in addition, by his own denial on oath, disconnected himself from any guilty or other participation in the offences charged against him."

On the case, as it reads in the report, it is difficult to understand how any sufficient case was made against the sitting member.

The cases cited by Sir J. Napier are said to be very fully reported in a book called "The Crickdale Case," or "Petrie's Cricklade Case," Petrie 1, Orme 218, not available to us at present.

I have traced some of these cases, such as *Petre v. Craft*, 4 East 433; *Lord Porchester v. Petrie*, 3 Doug. 261; but unfortunately, they are on collateral points, such as change venue, &c.

Hughes v. Marshall, 2 C. & J. 118, may also be referred to.

Great stress was laid on the argument as to this being a penal proceeding, and therefore requiring great strictness of proof.

I think that this proposition may (but merely for the purposes of the argument) be conceded; and that we may assume the case to be before us, as suggested by Sir J. Napier, "as an indictment against the sitting member for an offence against the Statute."

We may suppose it to be enacted to be an offence, if a candidate knowingly allowed, or was cognizant of bribery being practised by his agents to procure his election; not rendering it necessary to prove knowledge of any specific act, but merely of bribery being practised. Then, if we treat the evidence before us as urged in support of an indictment on such an enactment, we give the respondent the fullest benefit of this argument.

I am willing so to judge the case.

Then, on proof of all the facts in evidence before us,

should an unprejudiced jury properly find a guilty knowledge?

Apart from the oath of the respondent, what is the proper conclusion from these facts?

On the best consideration I can give the case, I am now of opinion with my learned brothers, that but one conclusion is sound. Then is the oath of respondent necessarily to exonerate him? If I answer yes, then the result must be, that notwithstanding any overwhelming mass of testimony, pointing with vehement force to the conclusion of knowledge, the expurgatory oath must always be accepted.

It was pressed upon me at the trial, and repeated on the appeal, that, there being no direct affirmative evidence of guilty knowledge, the oath should prevail.

If it be so, then no man could ever be convicted on circumstantial evidence, if he be a competent witness, and swears to his own innocence.

It is a waste of time to prove from authority that in all cases of crime, from the highest to the lowest, convictions are constantly obtained on proof of facts from which the legal presumption of guilt arises. Murder, arson, and the whole catalogue of crimes may be instanced.

In the cases depending on guilty knowledge, the evidence is generally circumstantial only; such as knowingly receiving stolen goods, the unlawful possession of coining materials, and such cases; cases under the licensing statutes, as to incurring penalties for knowingly allowing or doing certain prohibited acts.

The subject is minutely discussed at length in such books as *Wills* on Circumstantial Evidence; *Best* on Presumptions, and *Taylor* on Evidence.

As is well remarked by the last writer, 6th ed., vol. i., p. 83: "Admitting that the facts sworn to are satisfactorily proved, a further and a higher difficult duty still remains for the jury to perform. They must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion; for it is only on this last hypothesis that they can safely convict the accused."

I understand my learned brothers to hold that the mass of evidence here given is inconsistent with any other rational conclusion than that of guilty knowledge and consent.

My brother Gwynne has dissected and analyzed the evidence with a most convincing result.

I feel bound to agree with him, that if such an extraordinary chain of circumstances be insufficient to fasten knowledge upon the respondent, we must lay it down as our view of the law that knowledge must never, and can never be inferred, except on direct affirmative proof.

No human tribunals are infallible. They can only judge by what they find after full consideration to be the natural and reasonable result, according to all experience, of the facts before them—what has been called the known and experienced connection subsisting between collateral facts or circumstances satisfactorily proved, and the fact in controversy.

If our judgment be wrong, the respondent may truly be said to be the most unfortunate of men, as being the innocent victim of an extraordinary chain of circumstantial evidence, so complete, and so fatally binding in its completeness, as to compel conviction from Judges who strive to be faithful to the practice and traditions of their order, in always leaning to the side of mercy, and to the protection of the accused, whenever the scale of justice approaches to a balance.

GALT, J.—By sec. 18 of 36 Vic. ch. 27, it is enacted: “No candidate at any election shall directly or indirectly, employ any means of corruption by giving any sum of money,” &c., “nor shall he, either by himself, or his authorized agent for that purpose, threaten any elector with losing any office, salary, income, or advantage, with the intent to corrupt or bribe any elector to vote for such candidate or to keep back any elector from voting for any other candidate; nor shall he open and support or cause to be opened and supported at his costs and charges, any house of public entertainment for the accommodation of the electors; and if any representative returned

to the House of Commons, is proved guilty before the proper tribunal, of using any of the above means to procure his election, his election shall be thereby declared void and he shall be incapable of being a candidate, or being elected or returned during that Parliament."

By the 63rd sec. of 37 Vic., ch. 10, the 35th sec. of that Act is made applicable to all proceedings upon election petitions, under the Controverted Elections Act, 1873.

Sec. 35 provides that an appeal from the decision of the Judge who tried the case shall be heard and determined by the full Court of which the Judge who tried the case is a member; "and such judgment shall be pronounced both upon questions of law and of fact as should in the opinion of the said Court have been delivered by the said Judge; and the Court may make such order as to the return of the said deposit and as to the costs of the said appeal, as it may think just; and the registrar, clerk, or other proper officer of the said Court shall thereupon certify to the Speaker the judgment and decision of the said Court upon the several questions and matters of fact as well as of law upon which the Judge might otherwise have determined or certified his decision in pursuance of this Act, in the same manner as the Judge would otherwise have done."

It is under the foregoing provision that this case comes before us, and we are called upon to express our opinion both upon the questions of law and fact arising in it.

The whole case seems to me to resolve itself into one of fact, namely, does the evidence convince me that the respondent was guilty of using any of the means of corruption prohibited by the Statute for the purpose of procuring his election.

I have very carefully compared the statement prepared by my brother Gwynne with the evidence given at the trial, and entertain no doubt that it is correct.

This statement brings into one view the testimony bearing on the expenditure in the different wards, and traces the payments to the parties by whom and the places where the ywere made.

From this it appears that the persons who made them, (I am not referring to those who actually administered the bribes, but to those who furnished the means of bribery), were the partners in business with the respondent, who are shewn to have received a large part of the money from a gentleman closely connected with the respondent professionally, socially, and financially, and the place where they were made was the general committee room of the respondent, at which he was constantly in the habit of attending, and which was occupied by his agent Dixon and a numerous staff of clerks engaged in matters relating to the election, and such payments seem to have extended over a good many days prior to and on the day of voting.

The respondent himself says: "I was every day at headquarters. I saw Smallman," (one of his partners, and the person through whom most of the money was paid), "almost daily. I never discussed financial matters with him, or Dixon. I said to all to keep within the law. One day one Glackmeyer told me he understood there was money being spent, and he wanted some. I had good reason to believe that it was being spent against me. I had put men on to watch," &c., "I made a general personal canvass night and day."

When we look at the wholesale system of bribery pursued at the election, and remember, (according to the respondent's own evidence), that he had appointed men to watch as to the expenditure of money on the part of his opponent, and had made a personal canvass night and day, it is impossible, notwithstanding his disclaimer, to believe him ignorant of what was being done on his behalf by persons who, beyond question, were his agents; and although I am willing to accept his statement as to his having himself especially carefully avoided any corrupt or illegal practices, so far as it implies that he did not himself administer bribes, I cannot acquit him of having had a guilty knowledge of what it appears every one else was cognizant of. Mr. Harris, by whom a very large portion of the means of corruption was furnished, states, "It was in the atmosphere that money would be spent on both sides."

If the respondent had, as I am constrained to believe that he had, knowledge that corrupt practices were being used on his behalf by his agents, and did nothing to put a stop to them, I think it would, render the provisions of the Act of Parliament null and void, if he could absolve himself from personal responsibility by saying he did not commit them himself.

It was urged, and very forcibly, by Mr. Harrison, that this was a penal proceeding, and therefore that we were bound to accept the respondent's disclaimer in the absence of all direct evidence to the contrary. I cannot adopt this view. It is unfortunately the duty of Courts of Justice to try cases of the gravest kind on circumstantial evidence, and it is the duty of jurors to pronounce their verdict thereon. I am now considering the guilt or innocence of the respondent as if I were a juror, and I feel bound to say, that looking at the whole evidence, I can come to no other conclusion than that the respondent did know that corrupt practices were being employed by his agents to secure his election, and that as he did nothing to prevent them, he must be held to have consented thereto.

The learned Chief Justice has gone through a great many cases and authorities shewing the manner in which Courts of Justice draw inferences under circumstances similar to the present, and I fully concur in the judgment of himself and my brother Gwynne.

RE SOUTH HURON ELECTION CASE.—RITCHIE V. CAMERON.

Corrupt practices at elections—Subscriptions to churches.

The learned Judge who tried an election case, having set aside the election for bribery by agents, but found that the candidate was not himself guilty of corrupt practices. The Court, on appeal, declined, under the evidence set out in the case, to interfere; but the appeal was dismissed without costs, as there were strong grounds for presenting it; and had the finding been otherwise, it would not have been disturbed.

Remarks as to subscriptions to churches and charities given a short time before the election.

This was an appeal from the judgment of Galt, J., setting aside the election of the respondent, Malcolm Colin Cameron, on the ground of bribery by agents, but holding that the respondent was not himself guilty of corrupt practices.

The following are the grounds of appeal:—

1. That upon the law and evidence, the learned Judge should have declared the respondent to have been guilty of having employed, and used means of corruption by giving sums of money, and making promises of the same, and by giving or subscribing money to churches and colleges, with the intent to corrupt or bribe electors to vote for the said respondent, and to procure his election; and that the said respondent was incapable of being a candidate or of being elected and returned during the Parliament for which the election was held.

2. That upon the law and evidence the learned Judge should have found and declared that corrupt practices had been proved to have been committed by and with the knowledge and consent of the said respondent at the said election, by using the means of corruption hereinbefore mentioned.

The evidence so far as material is set out in the judgment.

Harrison, Q.C., for the appellant. There is sufficient evidence to disqualify the respondent. First, there is the evidence of Millar, as to his getting the note from the respondent on condition of his voting for him, and the

\$20 for his sons' vote; and although the respondent attempts to rebut this evidence, he entirely fails to do so. Millar is proved to be a respectable man, who had always borne a good character. His veracity had never been impeached. No improper motive can be assigned for his making the statement, which is given most circumstantially. Then there is the evidence of Jackson, which the respondent has not even attempted to deny. Then, as to the profuse expenditure, it has been argued in the *London Case*, ante p. 434, that that alone might be sufficient; and if that argument be sound, it will apply here: *Stayleybridge Case*, 1 O'M. & H. 67-8; *Taunton Case*, 1 O'M. & H. 184-5. Lastly, as to the subscription to the churches. There can be no question but that these amounts were given by the respondent with the intention of furthering his election, by rendering him popular, and so influencing votes, and this is a corrupt act for which the respondent is personally liable: *Mallow Case*, 2 O'M. & H. 22; *Northallerton Case*, 1 O'M. & H. 173; *Westbury Case*, 1 O'M. & H. 49; *Belfast Case*, 1 O'M. & H. 282; *Windsor Case*, 2 O'M. & H. 89; *Stafford Case*, 1 O'M. & H. 230. The respondent attempted to say that this had nothing to do with the election, but the mere fact of these items being contained in the account made up by himself, in his own handwriting, and headed as election expenses, clearly shews that they were for the purposes of the election.

Bethune, contra. As to the first point, Millar's evidence was very unsatisfactory, and was contradicted by the respondent, and the learned Judge refused to believe it. The Court therefore should not interfere with the finding of the Judge, who had all the witnesses before him, and had the opportunity of seeing and hearing how the evidence was given, and therefore could best determine the weight to be attached to it; and the same argument may be applied to Jackson's evidence. As to the second point, the appellants admit that there can be no personal responsibility. Then as to the subscription to the churches, the amounts given to Knox's

College and the churches in Goderich need not be considered, for the circumstances under which they were given occurred long before the election was thought of, and they cannot possibly have been intended to influence the election. As to the other amounts, the respondent said that he subscribed because it was his custom to do so, and his only motive was to do good, and not for the purpose of influencing his election. However, the motive could only be a mixed motive, namely, for charity and personal good; and it has been held that where there is a mixed motive, there is no liability. It was so held in the *Windsor Case*, 2 O'M. & H. 90, where it is said, "there is no harm in it, if a man has a legitimate motive for doing a thing, although, in addition to that, he has a motive, which, if it stood alone would be an illegitimate one"; and Richards, C. J., laid down the same doctrine in the *Kingston Case*, 11 C. L. J. N. S. 19. The cases also shew that a particular class must be reached, and there is nothing of the kind here: *Windsor Case*, 1 O'M. & H. 6; *Dungarvan Case*, 2 P. R. & D. 326; *Londonderry Case*, 21 L. J. N. S. 710.

Harrison, Q. C., in reply. The amount subscribed to the churches were certainly given with the intention of furthering the election and gaining popularity, and this is sufficient to render the respondent liable. The doctrine of "mixed motive," ascribed to Mr. Baron Bramwell in the *Windsor Case*, is not, as stated in the report, very intelligible.

HAGARTY, C. J., delivered the judgment of the Court.

This case comes before us by way of appeal from the decision of my brother Galt, who set aside the election of the respondent for bribery by agents, but found that the respondent was not himself guilty of corrupt practices.

The words of the statutable finding may be quoted: "Whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election."

We presume the actual finding was intended in sub-

stance to negative, not merely actual personal commission of any corrupt practice, but its commission by others with the knowledge and consent of the respondent.

We have read the evidence with much care.

Had the report been unfavourable to the respondent's personal connection with and knowledge of the matters proved in evidence, we hardly see how we could have held that there was not sufficient evidence to warrant such a finding.

The case presents three aspects: First, the positive charge of Jacob Millar as to the giving up of the promissory note, and the giving of the sum of \$20; secondly, the general conduct of the canvass, the large subscription and expenditure of money, a portion at least being expended for purposes clearly illegal, and the respondent's acts and general knowledge of and consent to any illegal expenditure; and thirdly, the subscriptions to churches.

As to the first point. Assuming the direct charge to depend wholly on the contradictory oaths of Millar and the respondent, we should not, in any ordinary case, interfere with the finding of the Judge, who had the advantage of hearing and seeing the witnesses, and judging of the weight properly to be given to their statements.

On the second point, we think the evidence discloses a large amount of corruption, and very reckless conduct on the part of the respondent's agents and supporters.

It is shewn that the respondent subscribed \$500 to a general fund of nearly \$3,000.

Several matters are relied on to connect the respondent personally with the expenditure.

One Callender swears that on the nomination day a cheque for \$500 was handed to him by the respondent, with instructions that it was to be spent in legitimate expenses. He seemed to have given the money to Mr. Farrow.

It was also shewn that one Churchill met the respondent in Callender's store, in Clinton, and the respondent told Callender to pay Churchill \$50, for lawful expenses in canvassing for him. This \$50 was afterwards refunded to witness

by the respondent. This money he got, and also \$160, from Farrow, in all \$210. He says he canvassed many days, hired a horse and cutter, and employed parties, some being voters, to help to canvass.

No attempt was made to account for this large expenditure. He says he kept no account, and the respondent did not ask him to keep any account.

Then Mr. Farrow states that he received \$250 directly from the respondent, and the \$500 from Callender. This was independent of the \$500 to the general fund. Mr. Farrow says the Joint Committee wished him to take charge of money for them, and he was to pay it as they directed.

The respondent was examined. He admitted a total expenditure, on his own part, of about \$1,550.—(In a subsequent part of his evidence he speaks of his whole expenditure as \$2,075),—\$500 subscription; \$750 paid at Clinton, and in addition about \$250; \$200 to one Doyle, and \$50 to Churchill, and \$50 to D. Patten; and in addition, bills after the election about \$300, of which \$210 were for printing: that his directions were most explicit as to not permitting any illegal expenditure, and that he had great confidence in the persons to whom he gave money, and that he was not aware of the amount his friends had subscribed.

He admitted that after the 1872 election, Millar told him he ought to give up the note he held against him; that the law bill was a steep one, and he (Millar) had done all he could for him at the election. The respondent then said he might call any time at his office and get the note, and that he, respondent, always intended from that time to give him up the note, and would have given it if asked for at any time. He did not see Millar further till the nomination, when Millar asked him for the note, saying he had called several times for the note, but could not see respondent. The latter said to call at any time and he could have it. He did call before the polling at his office, and got the note. The respondent strongly denied that anything was said about voting, or that the note was given up in any way as a bribe or inducement to vote at this election. Millar had sworn

that it was given up expressly to induce him to vote and to get his sons to vote. The respondent also denied giving him any money.

A man named Jackson swore that the respondent had canvassed him, and asked him to work for him at the election, and said if witness would tell him what money was needed he would give it, if witness would go to work. The respondent said there were five or six votes witness could control, if he would go into the contest. No amount was produced, named, or offered. Witness said he did not think that the respondent meant to bribe him personally. He thinks the respondent said that he was not afraid to trust witness with money.

We cannot find any denial of the statements of this witness in the respondent's evidence, nor any reference to him.

The respondent produced the following memorandum of his "election expenses:"—

Jany. 13, Callender, \$50, expenses, \$2	\$52 00
" 16, Expenses at nomination.....	25 00
" 24, Expenses on election tour, &c.	200 00

Subscription to Churches:

Church, Erinville.....	50 00
Freidsburg	75 00
Crediton.....	50 00
Near Bayfield	25 00
Stanley.....	25 00
Catholic church	25 00
	————— 250 00
Agricultural Society, Township Hay.....	
Jany. 20, Check to chairman of committee	500 00
" 30, Check to Clinton.....	500 00
W. W. Farrow.....	250 00
" 30, Check to self, canvassing Stanley	200 00
" 31, James Doyle	46 00
Feb'y 4, Sundries.	5 00
16, Treat, \$2, Capt. West, \$10.....	12 00
17, McLean, printing	116 25

March 24, Brown, Blake's Speeches.....	45 00
May 29, Matheson, printing.....	5 50
June 3, Schmidt.....	27 50
Lizar's, Voters' Lists	10 80
Aug. 13, Brown, printing returns.....	2 00

In this list appears the \$500 to given in Clinton to Callender, and then handed to Farrow. Also \$250, as given apparently the same day to Farrow.

No question seems to have been asked of the respondent as to the reason why he gave this money to Farrow. The latter says in his evidence, "I had no communication with Mr. Cameron respecting money before I received the \$250."

Again there is an item: "Check to self, canvassing Stanley, \$200.

No explanation was given as to this considerable item. It seems the more remarkable as the respondent's evidence is so marked as to his inability to canvass in consequence of the state of his health.

All this, as we read it, seems very remarkable.

We can only suppose, I assume, that the petitioners were so satisfied with the perfect correctness of the respondent's personal proceedings that they abstained from seeking or eliciting any details.

Then as to church subscriptions, we find in this memorandum:—

Church, Erinville.....	\$50 00
Freidsburg.....	75 00
Crediton.....	50 00
Near Bayfield	25 00
Stanley	25 00
Catholic church	25 00
	<hr/>
	\$250 00

All the evidence bearing on these items is as follows:

After the respondent produced the memorandum, he says, "I had no motive of furthering my election when I gave subscriptions to churches; I gave about \$250 during the week before the nomination."

On re-examination, he says, "I gave \$500 to Knox College; I gave \$100 or \$200 to the churches at Goderich."

From the argument we understood these two last donations were wholly unconnected by time or place with the election.

Then Archibald Bishop says: "The Erinville church subscription of \$50 was after the election. It was given to the man who carried up the Poll Books."

This last evidence is hardly intelligible to us. It may refer either to the subscription or actual payment of the money.

Again, we have to notice that no evidence has been given on this subscription question beyond the detail we have quoted.

The respondent said he had no motive of furthering his election by these subscriptions. We must presume he had some motive, but whatever it was, it does not appear.

We have no information as to where these churches are, or anything as to the probable effect of the subscriptions thereto on the electors of the Riding. We would naturally have looked for something enabling us more fully to understand the true position of the matter. For example, it might not be unimportant to have ascertained if the respondent, who states that he has represented the Riding since 1867, was in the habit of giving money to these churches on previous occasions, or as we find in some of the English cases, that as a representative, he was in the habit of subscribing liberally to charitable purposes at Christmas time.

In the *Westbury* case, 1 O'M. & H. 49, it was shewn that a cheque for £10 was sent to a Dissenting congregation almost at the same time the sender issued his address. In answer to a remark of counsel, that if the Judge thought nothing of it, he would not press it, Willes, J., says: "No; I do not say I think nothing of it. I have myself often observed that people who mean to become candidates often subscribe to things they would otherwise not have subscribed to; but I think that is a step off corrupt

practices; it is charity, stimulated by gratitude or hope of favours to come."

Nothing further appears in the case on this point.

In the *Stafford Case*, 1 O'M. & H. 230, it was proved that a previous member for the borough had authorized his agent to spend habitually £300 at Christmas in charities, and that at the Christmas immediately preceding the last election the sum distributed amounted to £720.

Blackburn, J., said: "I do not for a moment mean to say that there may not be many excellent charities distributed to these amounts and more by many people, but where I find that charities are distributed in a borough by those who are expecting to contest it as candidates, and distributed, without check, by the election agent of the borough, I am not charitable enough to draw any other conclusion than that they do it with the intention of giving the voters money in the hope and expectation that it will influence the future election. And there is, the further very great danger attending it, that the knowledge that they have been doing it will cause men at the future elections to give their votes in the expectation and hope that they will hereafter receive payment. When that is brought home to any one, I think it would undoubtedly mean corruption."

The subject is further illustrated by the *Boston Case* before Grove, J., the argument in which will be found in L. R. 9 C. P. 610, under the name of *Malcolm v. Parry*.

We would also refer to the judgment very lately delivered by Richards, C. J., in the *Kingston Case*, 11 Can. L. J. N. S. 19. He cites the *Windsor Case*, 2 O'M. & H. 90, and the remarks of Bramwell, B., as to a mixed motive in giving money in charity: "But there is no harm in it, if a man has a legitimate motive for doing a thing, although in addition to that he has a motive which, if it stood alone would be an illegitimate one."

The *Bewdley Case*, 1 O'M. & H. 21, he also cites as to the language of Willes, J.: "I cannot in the slightest degree

doubt that, if a fund is placed in the hands of an agent by a candidate, and if it is shewn that the agent expended it in corrupt practices afterwards, it is evidence tending to shew that the candidate paying into those hands the money that was spent in corrupt practices was himself intending that it should be spent in corrupt practices. Then it seems to be a question to what extent it was shewn, if the money was bestowed for corrupt practices, that the candidate who gave the money was aware of it, and in that case, also, the extent to which it was shewn that there were corrupt practices, would be very material. I think if it were shewn that there had been * * extensive bribery, a large number of people bribed, corrupt clubs paid money, and so forth, it would be a very serious question, whether the candidate in putting money into the hands of his agents was not personally cognizant of it."

The enquiry in the present case has not disclosed sufficient as to the application of the money paid by the respondent, to enable a full appreciation of these weighty remarks of very experienced Judges.

In the shape in which the case has come before us on appeal, we are not prepared to set aside the findings of the learned Judge.

We repeat that, had his finding as to personal knowledge been different, we certainly would not interfere.

We do not overlook the advantage he has had in hearing evidence which we can only read.

We therefore dismiss the appeal, but, as the statute allows us a discretion in dealing with the deposit of \$100, we do not allow any costs against the petitioners, and direct the deposit to be returned to them.

A close examination of the evidence induces us to think that there were very strong grounds for presenting this appeal, and we strongly impress it upon candidates and their agents at future elections to exhibit a larger measure of caution, and to select less suspicious seasons for exercising their liberality towards charitable and religious objects.

Appeal dismissed without costs.

On the 22nd of December, 1874, the following rule was read and promulgated in open Court :—

“IN THE COURT OF QUEEN’S BENCH, AND THE COURT OF
COMMON PLEAS.

Regulæ Generales.

AS OF MICHAELMAS TERM, 38TH VICTORIA.

Tuesday, 22nd day of December, A.D., 1874.

It is ordered,—Subject to the direction of the Court in all cases,—that hereafter, the first six cases standing undisposed of on the New Trial List, or such other cases as the Court shall see fit to direct, shall stand on such New Trial List each New Trial Day, to be peremptorily disposed of on each day, if the time of the Court will permit; and that no such case shall be put off or postponed without a special application being made to the Court, or a Judge, on affidavit, and on such terms as to payment of costs of the day and otherwise, as to the Court or Judge shall seem fit; and that if any such case is not disposed of on the day for which it stands, by being argued or postponed, if it is reached in its turn, and the time of the Court admits of its being so argued or postponed, it shall be struck out of the New Trial List, and the rule granted therein shall be discharged, unless otherwise ordered.

It is further ordered—That the Clerk of each Court shall prepare a List of such cases, to be so peremptorily disposed of, for each New Trial Day; and shall put up such list on the usual paper board of each Court respectively, on the day before that on which the said cases are to come on.

(Signed)	WM. B. RICHARDS, C.J.
“	JOHN H. HAGARTY, C.J., C.P.
“	JOS. C. MORRISON, J.
“	ADAM WILSON, J.
“	JOHN W. GWYNNE, J.
“	THOMAS GALT, J.

MEMORANDA.

In Michaelmas Term the following gentlemen were called to the Bar :—

NORMAN FITZHERBERT PATERSON, JOHN McCOSH,
MICHAEL EDWARD O'BRIEN, JAMES HENRY COYNE, WIL-
LIAM HENRY MCFADDEN, GEORGE HUGHES WATSON.

IN THE COURT OF ERROR AND APPEAL.

CLAXTON (plaintiff in the Court below), *Appellant*, v.
GILBERT (defendant in the Court below), *Respondent*.

Covenant running with the land—Equitable title—Assignment of chose in action.

Defendant being seized in fee of certain land in trust for his son, at the request of the son, mortgaged it to B. & V. for \$400, the son receiving the money and agreeing to pay it off. Afterwards the defendant conveyed to his son, the consideration stated being \$4,000, but in reality it was a gift, and the deed by inadvertence and mistake, contained a covenant for the right to convey, notwithstanding defendant's acts, and that he had done no act to encumber the land. On the 21st October, 1866, the son mortgaged the land to the plaintiff for \$400, and this mortgage was foreclosed by the plaintiff, who was compelled to pay off the mortgage to B. & V. It did not appear that the plaintiff had any knowledge of the trust between the father and son or of the arrangement between them as to the mortgage to B. & V., or that he knew of this mortgage until after the foreclosure, but it appeared that it, together with the other conveyances, had been duly registered, and that the land was worth both the mortgages. The plaintiff having sued the defendant on the covenant contained in defendant's deed to the son, to recover the amount paid to B. & V.

Held, affirming the judgment of the Court below, that the plaintiff could not recover, for that the facts would constitute a good defence on equitable grounds to an action brought against defendant by the son; and the title of the covenantor and covenantee being equitable only, the plaintiff, as assignee of the covenant, could stand in no better position than his assignor.

Appeal from the Court of Common Pleas.

Action for breach of a covenant contained in a certain deed from the defendant to one Rulif P. Gilbert.

The declaration alleged that the defendant by deed, dated 21st September, 1866, made in pursuance of the Act respecting short forms of conveyances, in consideration of \$4000, did grant, bargain, and sell to one Rulif P. Gilbert, his heirs and assigns, all and singular, that "certain parcel or tract of land," &c., setting it out; and did by the same deed, for himself, his heirs, executors, and

administrators, covenant with the said Rulif P. Gilbert, his heirs and assigns, that he had the right to convey the said lands to the said Rulif P. Gilbert, notwithstanding any act of him the said Benjamin Gilbert; and that he, the said Rulif P. Gilbert, should have quiet possession of the said lands free from all incumbrances; and that he, the said Benjamin Gilbert, had done no act to encumber the said lands: that he, the said Rulif P. Gilbert, thereafter, by deed dated the 13th October, 1866, made in pursuance of the Act respecting short forms of mortgages, in consideration of \$3,000, and other considerations therein mentioned, granted, bargained, and sold to the plaintiff, his heirs and assigns, the same lands, to have and to hold unto the said plaintiff, his heirs and assigns, to and for his and their sole and only use forever: which deed of mortgage was thereafter on failure of redemption duly foreclosed in plaintiff's favour, and the plaintiff entered into possession thereof under said last mentioned deed and foreclosure. And the plaintiff says that the defendant had, before the making of the said deed first hereinbefore mentioned, made, done, and executed certain acts and deeds whereby the said premises were charged, affected, and encumbered in title, charge, and estate—that is to say, he, the defendant, heretofore and before the making of the said covenant in said deed first hereinbefore mentioned, to wit, on the 1st December, 1864, by a certain deed of mortgage conveyed his right, title, estate, and interest in the said premises to one George Henry Boulter and James Vandervoort, to secure the payment to said George Henry Boulter and James Vandervoort of \$400 of lawful money of Canada, with interest thereon at the rate of twelve per cent. per annum on the days and times and in manner therein mentioned, that is to say, in two years from the date of said last mentioned mortgage. And the plaintiff says that before action there was due to the said George Henry Boulter and James Vandervoort on said mortgage to them, and an encumbrance on said lands, the sum of \$606 principal and interest, to the knowledge of the defendant, and

the defendant refused to pay the same, and the plaintiff was compelled to pay and did pay the said sum of \$606 to said last mentioned mortgagees, to the plaintiff's damage.

Plea, on equitable grounds : that before and at the time of the execution of the said mortgage to the said George Henry Boulter and James Vandervoort, defendant was seized of the lands in the declaration mentioned, upon trust, to and for the use of the said Rulif P. Gilbert, his heirs and assigns, and the said Rulif P. Gilbert applied for and negotiated a loan of the moneys in the mortgage hereinbefore mentioned, from the said George Henry Boulter and James Vandervoort for his own proper use, and agreed with the said George Henry Boulter and James Vandervoort to secure them in the repayment thereof and interest by mortgage on the said lands ; and the defendant then, at the request of the said Rulif P. Gilbert, made and executed to the said George Henry Boulter and James Vandervoort the said mortgage, and the said George Henry Boulter and James Vandervoort then lent the said moneys so secured to the said Rulif P. Gilbert, who then had and received the same to and for his own proper use, and the said Rulif P. Gilbert then agreed to pay off the said mortgage to the said George Henry Boulter and James Vandervoort from and out of his own proper moneys ; and thereupon the defendant afterwards by deed granted the said lands to the said Rulif P. Gilbert, his heirs and assigns, the operative words of conveyance therein being the word grant only, and no other operative word of conveyance, and did by inadvertence and mistake, and without any agreement so to do, covenant as in the declaration mentioned, and which conveyance was without any consideration whatever, actually paid or agreed to be paid and wholly as a gift and release of his said estate, given to the said Rulif P. Gilbert, his heirs and assigns ; and the said Rulif P. Gilbert mortgaged the said lands to the plaintiff as in the declaration alleged ; of all which the said plaintiff at the time of the execution of the said mortgage by the said Rulif P. Gilbert had notice. And the defendant further says that the said

covenant, the breach of which is complained of, conferred no right of action on the said Rulif P. Gilbert, to which the defendant had not a good defence as aforesaid in equity, and the plaintiff cannot and ought not to be permitted in equity to enforce the same. Issue.

The cause was tried before Wilson, J., without a jury, at Belleville, at the Spring Assizes of 1872.

From the evidence given at the trial the facts appeared to be as stated in the pleadings; but it was not shewn that the plaintiff had notice of any trust between the father and son, nor of any arrangement between them as to the Boulter and Vandervoort mortgage; nor did it appear that he had actual notice of its existence until after he had foreclosed, though it, together with the other conveyances, had been duly registered.

It was also proved that the deed from defendant to his son was wholly a gift, and that the son was to have repaid the Boulter and Vandervoort mortgage money.

It also appeared that the son kept a shop, and the object of the mortgage from him to the plaintiff was to secure a then existing debt for goods plaintiff supplied him with.

There was evidence that the value of the property was equal to both the mortgages.

It was contended on behalf of the plaintiff that there was no notice to the plaintiff of the mortgage to Boulter and Vandervoort.

On behalf of the defendant it was contended that the plaintiff could not recover, as he was merely the assignee of the covenant sued on, and therefore took no greater rights than his vendor possessed or had, for whom, and for whose use, and at whose request the incumbrance was created: that the deed from the defendant to the plaintiff's vendor was a gift; and no consideration was given or agreed upon; or why the verdict should not be reduced to nominal damages, the plaintiff being the owner by mortgage now foreclosed from the person to whom defendant made the conveyance containing the covenant sued on.

The learned Judge was of opinion that the plaintiff had

no notice of the trust between the defendant and Rulif, and he entered a verdict for the plaintiff for \$606.

In Easter Term following *Wallbridge*, Q. C., obtained a rule *nisi* under the Law Reform Act to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendant, on the grounds taken at the trial.

In Michaelmas Term, *Patterson*, Q. C., shewed cause, and *Wallbridge*, Q. C., supported the rule.

The arguments were substantially the same as those in the Court of Appeal.

GWYNNE, J., delivered the judgment of the Court.

It must be conceded that the circumstances attending the execution of the conveyance of the land by the father, Benjamin Gilbert, to his son, constituted a good defence upon equitable grounds to an action, if brought by the son against the father upon the covenant declared upon. The question then simply is, can the plaintiff, who claims only as a mortgagee under the son, maintain an action on the covenant, it being conceded that the mortgagor himself could not? From the fact that covenants real run with the land, it does not follow as a consequence that a right of action exists in the assignee of the land *eo instanti* of the conveyance being executed to him. If there has been a breach committed before assignment which is a continuing breach, then the assignee may sue for such damage as he sustains, and the assignor's right of action is parted with by the deed assigning the land. This is what *Huyck v. McDonald*, 3 O. S. 292; *Rees v. Strachan*, 14 U. C. R. 53; *Proctor v. Gamble*, 16 U. C. R. 110, and cases of that class decide. These cases also establish that although there be a covenant running with the land of which also there has been a breach, still no action may be sustainable, either by the covenantor or his assignee of the land; for when a vendor covenants for title and takes back from the vendee a mortgage to himself, the vendee cannot sue, for the covenant has passed to the mortgagee, and the mortgagee and vendor being the same person, there could exist no right of action anywhere.

Cuthbert v. Street, 9 C. P. 386, is an authority that where a plaintiff had executed a mortgage in fee, after eviction by title paramount, he might, notwithstanding the mortgage in fee, maintain an action against the vendor of the person from whom he purchased for the damage which he had sustained by the eviction.

Now, when Rulif Gilbert executed the mortgage to the plaintiff, he, Rulif, *ex concessis*, could not have maintained an action against his father in respect of the existence of the prior mortgage, which is relied upon as constituting the breach of the covenant sued upon. And although, upon the authority of *Gamble v. Rees*, 6 U. C. R. 397, and the *Empire Gold Mining Co. v. Jones*, 19 C. P. 245, and that class of cases, Benjamin's covenant passed to the plaintiff as mortgagee, with the land, still the land was only vested in him conditionally—that is to say, as a security for the payment, at a future day, of the moneys secured by the mortgage, with a proviso that the mortgagor should continue in possession until default, and that upon payment according to the terms of the mortgage the mortgage itself should become void; the mortgagee's beneficial interest in the covenant is as a security merely for the payment of his mortgage debt. Now assuming for the sake of argument that a mortgagee might, as a trustee for his mortgagor, maintain an action upon a covenant running with the land against the mortgagor's vendor, still, under the circumstances existing in this case, the plaintiff could not maintain such an action in respect of the existence of the prior mortgage, for Rulif could not himself have maintained such an action before execution of the mortgage to the plaintiff.

Could then the plaintiff in his own right maintain such an action before any default committed in the terms and conditions of his mortgage? It appears to us to be clear that he could not, so that, although the covenant sued upon ran with the land to the mortgagee, no cause of action arising out of that covenant vested in the mortgagee in his own right upon the execution of the mortgage, by reason of the existence of the prior mortgage.

No action could at any time be sustained by the plaintiff in his own right until he should be damnified. When then can the plaintiff be said to be damnified by the existence of the prior mortgage? If there be no default made in the terms of the mortgage he is not damnified at all, nor, (inasmuch as the covenant is in him, as the land is, as a security only for the payment of his debt), can he in our judgment be said ever to be damnified by the existence of the prior mortgage, unless or until it is proved that the land is insufficient to satisfy both incumbrances, and then only to the extent of the deficiency.

When a mortgagee acquires, as the plaintiff alleges in his declaration that he has acquired, all his mortgagor's equity of redemption by foreclosure, he does not, as it appears to us, by our law, although it seems to be otherwise in some of the United States, acquire any greater right to sue upon the covenant than he before had; for it is to the legal estate, and not to the estate acquired by foreclosure, that the covenant is annexed.

Now in the present case the position of the plaintiff was never any other in equity than that of a second mortgagee.

The Registry Act, whether he had or not in fact actual notice of the existence of the prior mortgage, affected him with notice of that mortgage.

In a Court of Equity he must be regarded as contracting only for the position of second mortgagee, and as such all that he could insist upon in equity was the right of acquiring the fee simple absolute *in satisfaction of his mortgage debt* by foreclosure of his mortgagor and payment of the prior incumbrance, *or* the right of having the mortgaged premises sold for satisfaction of the incumbrances, according to their priority, claiming payment of any deficiency, first from his mortgagor personally, or, failing that, *then* it may be, *perhaps*, out of this covenant of Benjamin.

In the case before us there was evidence to the effect that the land was of sufficient value to satisfy both mortgages. The plaintiff has elected to foreclose his mortgagor, and pay off the prior incumbrance, and so to become seized of

the whole estate in the premises thus acquired in full satisfaction of his mortgage debt. As the plaintiff has preferred this mode of proceeding to having the land sold, when it could have been made to appear whether in fact the existence of the prior mortgage operated as any damnification to him, he cannot now rely upon the covenant sued upon, and upon the prior mortgage as constituting a breach of it, whereof he can take advantage for the purpose of recovering satisfaction beyond the land itself, which he has already acquired by process in equity in satisfaction of his mortgage debt, as security for the payment of which he was interested in the covenant sued upon.

The plea, then, as it appears to us, affords a good defence upon equitable grounds to the cause of action disclosed in the declaration, and the evidence sufficiently supports the plea.

The verdict therefore should be entered for the defendant.

Rule absolute.

From this judgment the plaintiff appealed.

(a) *Patterson*, Q. C., for the appellant. There is nothing proved by the defendant to prevent the plaintiff recovering. As to the defendant being seized in trust for Rulif, it is shewn that the defendant purchased the land, and was the owner of it, and although he may have intended to give it to Rulif, and may not have received any portion of the money borrowed, this, although it might constitute a good defence in equity, as between the defendant and Rulif, does not do so as between the defendant and the plaintiff. As to notice, it is quite clear there was no actual notice, and the only notice there could be would be constructive notice under the Registry Act, but the statute does not apply to a person like the plaintiff. The object of the Act is to protect the mortgagees as between themselves, but not as between defendant and plaintiff: *Merchants Bank v. Mor-*

(a) Argued January 13th, 1873, before DRAPER, C. J. of Appeal, RICHARDS, C. J., SPRAGGE, C., HAGARTY, C. J., C. P., STRONG, V. C., GALT, J., BLAKE, V. C.

ri^{son}, 18 Grant 382. Assuming however he had notice, it cannot control the express covenant : *Trust and Loan Co. v. Covert*, 27 U. C. R. 120, 30 U. C. R. 238. Rulif could sue at law on the covenant, and although the defendant may have an equity against him, yet, even in equity, until the deed is reformed, it cannot be set up. This, however, does not apply to the plaintiff. The defendant's covenant was annexed to the land and passed to the plaintiff, and entitles him to sue in his legal right for the subsequent breach which occurred, and not as upon a chose in action : *Kingdon v. Nottle*, 1 M. & S. 355, 4 M. & S. 53 ; *Athenæum Life Assurance Society v. Pooley*, 3 DeG. & J. 294. See also, *Hunter v. Walters*, L. R. 11 Eq. 292 ; *Earl of Aldborough v. Trye*, 7 Cl. & F. 463.

Moss, Q. C., and *W. J. Lockhart Gordon*, for the respondent. On the facts stated the plaintiff could not have sued in equity, and neither can he do so at law. All the defendant conveyed to Rulif was an equity of redemption, and the purchaser of an equitable estate takes subject to all the equities, and therefore to the trust between the defendant and Rulif ; but apart from the question of legal or equitable estate, the covenant was a covenant in gross, and therefore there would be no right of action : *Phillips v. Phillips*, 8 Jur. N. S. 145 ; *Lethbridge v. Mytton*, 2 B. & Ad. 772. There is, however, no damage proved. The mortgage between Rulif and the plaintiff only conveyed the land for a limited purpose, namely, as security for the mortgage debt, and the covenant is only a covenant for the amount the security is damaged by the prior mortgage. The plaintiff cannot sue for himself alone, but as trustee for the mortgagor for the actual damage his security has sustained, and it clearly appears here that it has received none, as it was proved that the land was of sufficient value to pay off both mortgages ; and the fact of the plaintiff having foreclosed puts him in no better position, as it amounts to the same as if Rulif had released to defendant. See also, *Gee v. Smart*, 8 E. & B., 313 ; *Whitton v. Peacock*, 2 Bing. N C. 411 ; *Crafts v. Tritton*, 8 Taunt. 365 ; *Totten*

v. Douglass, 18 Grant 341; *Ryckman v. Canada Life Assurance Co.*, 17 Grant 550; *Browning v. Wright*, 2 B. & P. 13; *Waring v. Ward*, 7 Ves. 337; *Spencer's Case*, Sm. L. C., 6th ed., vol. 1, p. 45; *Platt on Covenants*, 18; *Preston on Abstracts*, 3rd ed., vol. iii., p. 283.

Patterson, Q. C., in reply. By the foreclosure the plaintiff is placed in the same position as if he had a regular conveyance from the son, and therefore at the time the action was brought the relation of the mortgagor and the mortgagee did not exist. It is also contended by the defendant that the covenant was one in gross, but it is a covenant running with the land, and therefore passed to the plaintiff. See *Connell v. Boulton*, 25 U. C. R. 444. As to the value of the land, nothing was found as to value, and it is not in issue.

December 18th, 1874, (a).—RICHARDS, C. J.—In *Athenæum Life Assurance Society v. Pooley*, 3 DeG. & J. 294, 5 Jur. N. S. 129, 32 L. T. 247, Knight Bruce, Lord Justice, said in relation to one of the parties, at p. 131 of the Jurist: "Unfortunately, however, he has bought what the English law calls a chose in action; and it is too clearly settled to admit of question or argument, that a person buying a chose in action, which can only be put in suit in the name of the original holder from whom he buys, must abide the case of the person from he buys, in whose name it must be put in suit at law."

Lord Justice Turner, in the same case, says, at p. 133: "I take no principle to be better settled than the ordinary principle of this Court, that the assignee of a chose in action must take subject to all the equities which affect the assignor. * * The principle is founded upon very good ground, for otherwise it would be competent in any case of fraud for a man by fraud to obtain a legal right, and having obtained a legal right to assign it in equity, which he may well do, to a person who has no knowledge of the fraud, and then to say,

(a) Present DRAPER, C. J., of Appeal; RICHARDS, C. J., SPRAGGE, C., HAGARTY, C. J., C. P., MORRISON, J., GALT, J., BLAKE, V. C.

‘Now that third person may bring an action in the name of the original obligee; and, bringing that action in the name of the original obligee, a Court of Equity ought not to restrain that action.’”

In *Phillips v. Phillips*, 8 Jur. N. S. 145; 5 L. T. N. S. 655, Lord Westbury says: “Now, I take it to be a clear proposition, that every conveyance of an equitable interest is an innocent conveyance—that is to say, the grant of a person entitled in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seized of an equitable estate, the legal estate being outstanding, makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has, namely, the estate, subject to the annuity or mortgage, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take, and are ranked, according to the dates of their securities; and the maxim applies, ‘*qui prior est in tempore, potior est in jure*.’ The first grantee is *potior*—that is, *potentior*. He has a better and superior, because a prior, equity. * * Now, the defence of a purchaser for valuable consideration is the creature of the Court of Equity, and it can never be used in a manner at variance with the elementary rules which have already been stated.”

Thornton v. Court, 3 DeG. McN. & G. 293, 17 Jur. 151, shews that where the plaintiff had bought the land from the defendant, and had mortgaged it to a third person, and was evicted by title paramount when the mortgage was outstanding, that nevertheless the action could be brought to recover damages against the defendant on his covenant for quiet enjoyment; and a Court of Equity restrained the defendant from setting up the mortgage made by the plaintiff.

It seems to follow as a natural result from these authorities, that if the interest assigned (mortgaged) by Rulif P. Gilbert to the plaintiff be considered simply as an equitable

interest, and only confers on him the same rights which he himself had, then the plaintiff cannot recover in this action from the defendant, and the judgment in the Court below is correct and ought to be affirmed, and this appeal should be dismissed with costs.

The question then turns on this—whether Rulif P. Gilbert, having assumed to convey absolutely, without reference to the mortgage by the defendant which preceded the deed to him, (Rulif), can he be said to have conveyed such an interest to the plaintiff as will enable him to sue the defendant. At the time he made the conveyance he had undoubtedly in fact only the equitable estate; could he be considered as having the legal estate by estoppel? The doctrine at one time seemed to be that a deed which passed anything would not be permitted to operate by way of estoppel, and that consequently, the equitable estate having passed by the mortgage deed to the plaintiff, he is only seized of the equitable estate which Rulif P. Gilbert had at the time, and that would not have enabled him successfully, in face of the existing equities between him and his father, to have enforced the covenant against him.

Cuthbertson v. Irving, 4 H. & N. 742, holds that where a lessor, who has only an equitable estate, as a mortgagor, grants a lease, and the lessee covenants with the lessor, his heirs and assigns, to pay the rent, and do certain other things, such as repairs, and when the lessor assigns and conveys his estate to a third person by words which would pass a fee, in an action on a breach of the covenant by the assignee, the lessee is estopped from shewing that the lessor had not the legal estate. In an action by the mortgagor himself, the lessee would clearly be estopped from denying the lessor's title, and so he is estopped from denying the title of his assignee. But here, if the party to whom the defendant made the deed brought an action against him, he could well set up this equity, and would not in any way be estopped, and the latter could not transfer a greater estate to his purchaser than he had himself, and therefore the defendant's proper defence cannot properly be cut out under the doctrine of estoppel.

I am, therefore, of opinion that the judgment in the Court below is correct.

SPRAGGE, C.—I am of opinion that the order for leave to the defendant to enter a nonsuit was rightly granted.

The position of the plaintiff is that of a second mortgagee, the legal estate being in the first mortgagee; the covenant sued upon is by a former owner of the estate, and creator of the first mortgage to the creator of the second mortgage, and is contained in a conveyance which operated as a conveyance of the equity of redemption by the grantor. The title, therefore, of the covenantor and of the covenantee, as well as of the second mortgagee, is equitable only. There being no covenant from the defendant to the plaintiff, the plaintiff's position necessarily is that the covenant is a covenant running with the land.

Upon this, I think, the law is clearly against him: *Whitton v. Peacock*, 2 Bing. N. C. 411, is a clear authority against it. It affirmed the doctrine that where the title of the covenantor and the covenantee is equitable, the covenants from the one to the other are covenants in gross, which do not run with the land, or convey any right of action to the assignee.

The same principle was affirmed by Lord Kenyon in the earlier case of *Webb v. Russell*, 3 T. R. 393. The Chief Justice observed, at p. 402: "Here Stokes had no interest in the land of which a Court of Law could take notice; though he had an equity of redemption, an interest which a Court of Equity would take notice of. These, therefore, were collateral covenants."

In that case the Court characterized the defence as a most unrighteous and unconscientious nature, and regretted that they could find no ground on which the plaintiff's case could be supported.

In this case the merits of the case are with the defendant. As between the covenantor and the covenantee, a suit by the latter in a Court of Equity would not be entertained for a moment.

The short question, however, for the Court below seems to me to have been whether the covenant sued upon was a covenant running with the land ; and that question must in my opinion be answered in the negative.

It is unnecessary in my view of the case to consider whether, if a Court of Law could have entertained the question between these parties, the considerations upon which my brother Gwynne has placed the decision of the Court below are sufficient to disentitle the plaintiff to judgment. I by no means say that they are not, but I desire not to be understood as assenting to all the propositions to be found in the judgment of my learned brother. I must especially dissent from his position that in a Court of Equity a party taking a second mortgage must be regarded only as contracting for the position of second mortgagee. I do not understand such to be his position, but as the question of his position does not, as it seems to me, arise in this case I content myself with simply stating my dissent.

BLAKE, V. C.—On the facts of this case there can be no doubt that Rulif P. Gilbert could not succeed in an action on the covenant which the plaintiff is attempting to enforce against the defendant, as the incumbrance in question is one which, as between Rulif and Benjamin, Rulif is bound to discharge.

It is argued, however, that the plaintiff, as mortgagee of the interest of Rulif in the lands, stands in such a position that he, either as transferee of this covenant, or as the grantee of an estate in the premises which carries with it this covenant, as one that runs with the land, can succeed in the action. It seems to me that the fact that the legal estate was outstanding in the prior mortgagee at the time that the plaintiff took his security, answers both of these positions. As the parties were dealing with an equitable estate only, the assignment to the plaintiff operated as an innocent conveyance, and passed merely the right which Rulif then possessed, and this did not embrace the right to sue on the

covenant in question. For the same reason, the covenant did not pass to the plaintiff, although it is one which runs with the land, for as the land was at the time of the giving this covenant outstanding in the prior mortgagee, it did not pass to the plaintiff, and thus was wanting the vehicle to carry the covenant to him.

It is true where a covenant extends to a thing in *esse*, parcel of the demise, the thing to be done by force of the covenant is annexed and appurtenant to the thing demised. Although there is some authority for the proposition that, following this rule, the interest a mortgagee takes, under circumstances such as the present, in the estate, is sufficient to draw with it the covenant, yet I think the better opinion is that this is not the effect. If the covenant did in any way pass to the plaintiff, he takes it as a mere chose in action, on which he may sue in the name of the covenantor : *Riddell v. Riddell*, 7 Sim. 529 ; *Spencer v. Boyes*, 4 Ves. 369. But taking it as a chose in action, he does so subject to all the equities that existed as between the original covenantor and covenantee, and therefore stands in no better position than Rulif, who is disentitled to preceed thereon against Benjamin. In dealing with the case simply as one involving the position of the holder of a chose in action, and its assignee, it has been often held that the registry laws do not apply. The plaintiff has notice through the registry office that the legal estate does not pass to him ; knowing that he does not take this, he accepts an instrument which gives him certain rights in respect of a covenant which, however, are controlled by the general rule that affects the transfer of choses in action. *Phillips v. Phillips*, 8 Jur. N. S. 145, lays down general principles as to the grantees and encumbrances of equitable estates, which are distinct and easy of apprehension ; but this case seems at variance with *Attorney-General v. Wilkins*, 17 Beav. 785 ; *Penny v. Watts*, 2 DeG. & S., 501, and 1 McN. & G. 150, and it has met the marked disapproval of Lord St. Leonards in his V. & P., 4th ed. vol. ii., p. 761-2, and seems to have been ignored in the recent case of *Ernest v. Vivian*, 33 L. J. Ch. 513.

I agree in the statement in the judgment of the Court below, that the plaintiff must be treated under the Registry Law as if he had actual notice of the prior mortgage ; but I dissent from the proposition that under the circumstances of this case " he must be regarded as contracting only for the position of second mortgagee." I am of opinion that where a man takes a second mortgage, with a covenant, general in its terms, against encumbrances, and whether the previous encumbrance be or be not registered, under such covenant he is protected against the encumbrance, whether known or unknown, contracts for the position of first mortgagee, and is entitled to have the removal of that which stands in the way of the accomplishment of this object. If the mortgagor does not intend that his covenant is to have its full force and effect, he must limit its terms so that that, which in words is included within it, may be excluded.

I think the plaintiff is without recourse on this covenant as against the defendant, and that the appeal should be dismissed with costs.

DRAPER, C. J., of Appeal, HAGARTY, C. J., C. P., MORRISON, and GALT, J., concurred.

Appeal dismissed with costs.

HILARY TERM, 38 VICTORIA, 1875.

From February 1st to February 13th.

Present :

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ JOHN WELLINGTON GWYNNE, J.

“ THOMAS GALT, J.

DAVIS V. PITCHERS.

*Lease—Statutory form—Compliance with—Covenant for quiet enjoyment—
Demise—C.S.U.C., ch. 92—14 & 15 Vic., ch. 8—Construction of.*

A lease made in 1870, purported to be made “in pursuance of the Act to facilitate the leasing of lands and tenements,” being the title of the 14 & 15 Vic., ch. 8, consolidated in ch. 92, Consol. Stat. U. C., instead of “in pursuance of an Act respecting short forms of leases,” which is the title of the consolidated Act.

Held, nevertheless, a sufficient reference to the consolidated Act, so as to bring the lease within its provisions.

Where, therefore, the plaintiff (the lessee) was evicted by title paramount to the lessor: *Held*, that he could not recover as for a breach of the covenant for quiet enjoyment, which is limited by the statute to the acts of the lessor and those claiming under him, nor under an implied covenant contained in the word “demise,” as it is controlled by the express covenant for quiet enjoyment.

DECLARATION. First count: on a lease for six years, from the defendant to the plaintiff, with a covenant that the lessor had power and authority to demise: breach, that he had not such power, whereby the plaintiff was evicted by one Wm. Hedden.

Second count: setting out the demise, with a covenant for quiet enjoyment without disturbance by the defendant or any other person: breach, that the title was in Wm. Hedden, who evicted the plaintiff.

Pleas: 1. To each count, *non est factum*.

2. To first count: that the lessor had power to demise.

3. That Hedden did not lawfully enter or evict the plaintiff.

4. That Hedden had no lawful title.

To the second count: denying Hedden's lawful entry, and that Hedden had no title.

The cause was tried before Strong, J., without a jury, at Goderich, at the Fall Assizes of 1874.

At the trial a lease was proved from the defendant to the plaintiff, dated the 16th of June, 1870.

It began: "This indenture, made the 16th June, A.D. 1870, *in pursuance of the Act to facilitate the leasing of lands and tenements*, between Mrs. Emily Hedden, of the township of Stephen, &c., of the first part, and James Davis of the township of Hay, &c., yeoman, of the second part; witnesseth," &c. And after stating the premises, the term, and the rent reserved, it proceeded: "And the said lessee, for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said lessor, her heirs and assigns, to pay rent, and to pay taxes, and to repair, and to keep up fences, and not to cut down timber; and that the said lessor may enter and view state of repairs; and that the said lessee will repair according to notice; and will not assign or sub-let without leave; and will not carry on any business that will be deemed a nuisance on the premises; and that he will leave the premises 'in good repair. Proviso for re-entry by the said lessor on non-payment of rent, or non-performance of covenants, or seizure or forfeiture of the said term for any other causes aforesaid. The said lessor covenants with the said lessee for quiet enjoyment."

The lease contained some special provisions not necessary to set out, and was executed by the lessor.

It appeared that the lessor was the widow of one Thomas Hedden, her first husband, and William Hedden was her son.

It was objected, on behalf of the defendant, amongst other grounds, which are not material to this report, that the lease must be considered as made under the

Short Form Act, and so the covenant for quiet enjoyment was limited to the acts of the lessor and those claiming under her; that the covenant being so limited, the plaintiff could not recover under the second count: for William Hedden claimed adversely to, and not under the lessor, and that neither could he recover under the first count, as the implied covenant contained in the word "demise" was controlled by the express covenant for quiet enjoyment.

The learned Judge was of opinion that the plaintiff could not recover, and entered a verdict for the defendant.

In Michaelmas term, *Robinson*, Q.C., obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict entered for the defendant, and to enter a verdict for the plaintiff.

In this term, *S. Richards*, Q.C., shewed cause. The plaintiff must fail on the first count, as the implied covenant contained in the word "demise" is controlled by the terms of the express covenant for quiet enjoyment, which is restricted to the lessor's own acts. The cases shew that the word "demise" does not imply a covenant for title when there is an express covenant inconsistent with it: *Bandy v. Cartwright*, 8 Ex. 913; *Messent v. Reynolds*, 3 C. B. 194; *Line v. Stephenson*, 4 Bing. N. C. 678; *Woodfall*, L. & T. 10th ed., 692. The plaintiff must also fail on the second count, as the covenant for quiet enjoyment is limited under the statute to the acts of the lessor or any one lawfully claiming by or through her. It is contended, however, by the plaintiff that the lease cannot be considered as made under the Act, as it is expressed to be made "in pursuance of the Act to facilitate the leasing of lands and tenements," and not "in pursuance of the Act respecting short forms of leases," the words used in the Act. The former heading, however, is that used in the Act of 14 & 15 Vic. ch. 8, from which the Consolidated Act is taken; and, although the heading was changed by the latter Act, yet, under Con. Stat. U.C. ch. 1,

sec. 10, it is enacted that the Consolidated Acts are not to be considered new Acts, but merely as a consolidation or declaratory of the law as contained in the repealed Acts, and for which the Consolidated Acts are substituted, and the lease would clearly come within the provisions of the repealed Act. Also, under sec. 1, the lease is sufficient, if in accordance with the forms given in the schedule, or expressed to be made in pursuance of the Act, or referring thereto; and it clearly comes within the condition as referring to the Act. The Act is in reality an Act to facilitate the leasing of lands and tenements, and in fact is the only Act for this purpose.

Robinson, Q. C., contra. The plaintiff is entitled to recover under the second count, for the lease is not made under the Short Forms Act, and therefore the covenant is not restricted to the acts of the lessor. In the first schedule to the Consolidated Act a form is given, which expresses the lease to be made "In pursuance of the Act respecting short forms of leases." In order to come within the statute, the lease must strictly comply with its provisions. This lease is certainly not made according to the form, nor is it expressed to be made in pursuance of this Act, nor does it refer thereto. There is in fact now no such Act as is mentioned in the lease: *Leith's Real Prop. Stats.* 102-3.

HAGARTY, C. J.—One of the many questions raised was, whether the lease was to be considered as under the statute. If so, then the covenant, "The lessor covenants with the said lessee for quiet enjoyment," has only a limited application to the acts of the lessor and those claiming under her.

The entry forming the breach was on title claimed as paramount to the lessor.

The reference to the statute Consol. Stat. U. C. ch. 92, should have been "in pursuance of the Act respecting short forms of leases," instead of the words here used—"in pursuance of the Act to facilitate the leasing of lands and tenements."

It was argued before us that there was an implied covenant that the lessor had the right to demise. But this can hardly be, if the covenant for quiet enjoyment be restricted to the lessor's own acts.

In *Smith's L. & T.* 207, note *a.*, "If to the implied covenant arising from the word 'demise' is added an express covenant for quiet enjoyment, without eviction by lessors, the express covenant restricts the implied covenant."

In *Line v. Stephenson*, 5 Bing. N. C. 183, in error; the Court say, at p. 186, "It is true the word *demise* does imply covenant for title, but only when there is no express covenant inconsistent with such a construction."

The law is very clearly stated to the same effect in *Platt on Leases*, vol. ii., p. 285.

It becomes, therefore, important to decide on the effect of this covenant.

The Act of 1851, 14-15 Vic., ch. 8, is intitled "An Act to facilitate the leasing of lands and tenements;" and its preamble states, "Whereas it is expedient to facilitate the leasing of lands and tenements." This Act, differing from the Consolidated Act, gives no form for the beginning of the lease, but merely a set of short forms of covenants, with the amplified effect thereof, as in the later Act.

Sec. 1. "Whenever any person, being a party to any deed *which shall be expressed to be made in pursuance of this Act*, shall employ in such deed any of the forms of words contained in column one of the schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect and be construed as if such person had inserted in such deed the form of words contained in column two," &c.

The Upper Canada Consolidated Act of 1859, ch. 92, is entitled "An Act respecting short forms of leases." There is no preamble. It varies very much in form from the previous Act.

It gives two schedules. The first gives a form of lease :
"This indenture, made the day of

A.D. 18 , *in pursuance of the Act respecting short forms of leases, between, &c.*"

After a form of habendum and reddendum, comes schedule 2, with short forms of covenants, and their amplified legal effect, as in the first Act.

Sec. 1 says: "When a deed, made *according to the forms set forth in the first schedule to this Act*, or any other deed expressed to be made *in pursuance of this Act, or referring thereto*, contains any of the forms or words contained in column one of the second schedule hereto annexed," &c., "such deed shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two, of the same schedule," &c.

Sec. 2 is like the provision in the former Act, that a deed that "fails to take effect by virtue of this Act, shall nevertheless be effectual to bind the parties thereto, so far as the rules of law or equity will permit, as if the Act had not been made."

The lease before us was unquestionably intended by the parties to be under the statute. The string of covenants are inserted almost verbatim. The proviso for re-entry is there, and the covenant for quiet enjoyment is exactly in the statutable words.

The whole objection lies in the mistake of the conveyancer in mentioning the Act "to facilitate the leasing of lands and tenements," instead of the Act "respecting short forms of leases."

It is not easy to see why the change was made in the style or name of the Act by the Consolidators. The last Act is as directly an Act to facilitate the leasing of lands and tenements as the preceding.

As a matter of fact and substance, this lease is as much made in pursuance of the one Act as of the other.

We must see very clearly that the objection is insurmountable before we should give effect to it.

Curiously enough, the Act immediately preceding this Act in the Consolidated Statutes is entitled "An Act respecting short forms of conveyances," and in frame is

very like that for leases. But in the form given it says : " This indenture, made," &c., " in pursuance of the Act to facilitate the conveyance of real property," following the old title of 9 Vic., ch. 6.

Under Sec. 1 of the Leases Act,(1), a deed made according to the form in the schedule ; (2), any deed expressed to be made in pursuance of the Act, or (3) " referring thereto," is to come within its provisions.

This lease is not according to the form in the schedule ; nor does it, in express words, profess to be made in pursuance of it. But it seems, I think, to come fairly within the third condition, of referring to the Act.

The Act is certainly one to facilitate the leasing of lands and tenements, and the only Act of which we are aware that professes to bear on that object.

We cannot, I think, ignore the nature and process of our consolidations of the statutes. The consolidation does not profess to be an enacting of a new law, but a systematizing and consolidation of existing laws. Each section refers to the hitherto existing section, which it professes to re-enact or consolidate. Here every section refers back to the corresponding provision in the Act of 1851.

The Act respecting the Consolidated Statutes for Upper Canada, ch. 1, sec. 8, declares, that " The said Consolidated Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Act so repealed, and for which the said Consolidated Statutes are substituted."

Sec. 10 says : " Any reference in any former Act remaining in force, or in any instrument or document, to any Act or enactment so repealed, shall after the Consolidated Statutes take effect, be held, as regards any subsequent transaction, matter or thing, to be a reference to the enactments in the Consolidated Statutes having the same effect as such repealed Act or enactment."

The instruments here referred to are probably instruments existing before the consolidation. But we are sat-

isfied that we should look, not merely at the consolidated, but also at the prior Act, to ascertain the true rule of decision.

Nothing is more common than, in any doubtful case of construction, for the Courts, in endeavouring to find the true meaning, to read the Consolidating Act in the light, as it were, of the preceding Act or Acts.

There are not many authorities bearing on this subject. None were cited on the argument.

The subject is noticed in *Dwarris*, 2nd ed., p. 148, 9; and in 2 *Hale's P. C.*, ch. 25. The latter is chiefly on references to statutes on indictment.

In *Nixon v. Nanney*, 1 Q. B. 747, more fully reported in 1 *Gale & Dav*, 370, a statute gave a form of conviction requiring the title of the Act to be inserted in it. In setting out the title the word "part," in the sentence, "that *part* of Great Britain, called England" was omitted. The Court citing a case of *Chance v. Adams*, said that it met the objection, and upheld the conviction.

Chance v. Adams, 1 Ld. Raym. 77, was a penal action on a statute, reciting it as "An Act for granting several rates upon tonnage of ships and vessels."

It was objected that the Act was "for tonnage of ships," and that there was no such Act as that declared on.

This case is denied in *Mills v. Wilkins*, 2 Salk. 609, and 6 Mod. 62, where it is said, if you state the title, "You tie your justification to an Act so entitled, and if you cannot produce one, you are gone."

In *Boyce v. Whitaker*, Doug. 95, Lord Mansfield said, at p. 97: "If the defendant had unnecessarily set out the Act of Parliament, which it seemed to him he had, he would hold him to half a letter."

The objections were very trifling "indictments *by* trespass," instead of "indictments *of* trespass; and "Capias ut *legatum*," instead of "Capias ut *lagatum*."

In *Rumsey v. Tufnell*, 2 Bing. 255, judgment was arrested, because in a declaration against a sheriff for extortion, the statute was quoted as passed in the 29th year of Eliza-

beth, on the authority of the two previous cases, which shewed that there was no Parliament roll for the 29th Elizabeth. The Act had reference to the first day of the session, which commenced in the 28th year of Elizabeth.

On the whole I think the lease is to be considered as made in pursuance of the existing law as to short forms of leases.

In this view the covenant is limited to disturbances or interruptions on the part of the lessor, or any one claiming lawfully by or through her.

In this view it is unnecessary to discuss the several other important points raised at the trial, and on the argument; and the rule to set aside the verdict of the learned Judge for the defendant will be discharged.

GWYNNE, J.—The lease, in my opinion, sufficiently refers to the Consolidated Statutes of Upper Canada, ch. 92, so as to make it a lease subject to the provisions of that Act.

In order to incorporate the Act with the lease, it is not necessary that the Act should be referred to by its title.

It is sufficient, if, in any form of words, the instrument be expressed to be made in pursuance of that Act, or if by any form of expression the Act be referred to as indicating the intention that the lease should be affected by it.

The title of the Act in the Consolidated Statutes is, it is true, "An Act respecting short forms of leases." Its purport and object we know is to facilitate the leasing of lands and tenements, and by reference to it as it was before consolidation, we find that it was entitled so as to express this object; and the preamble recited such to be its object.

The consolidation of the Act, while changing the title, has in no respect changed the object; and apparently to defeat objections, which might be made in the case of a slight departure from the form of a lease given in the schedule, the statute provides that it shall apply, not only to cases where the deed is made according to the very form given, but also to all deeds which are expressed to be made

in pursuance of the Act, *or referring thereto* ; and which contain any of the forms of words contained in column one of the second schedule to the Act.

This lease is expressed to be made in pursuance of the Act to facilitate the leasing of lands and tenements. We must notice that there is a statute having this purpose for its object, and that there is only one such statute, and that it is that which in the Consolidated Statutes is entitled "An Act respecting short forms of leases." This therefore must be held to be that in pursuance of which the lease is expressed to be made, the identity being determined by the object expressed to be intended to be attained, though not by its title.

Nothing can be plainer to my mind than that the intention of the parties was, that the provisions of the Act which has for its object the facilitating the leasing of lands and tenements should be incorporated with the lease. It would therefore be contrary to all principle to defeat so manifest an intention, because the parties have not referred to the Act by its title.

The previous statute, ch. 91, seems to afford a legislative warrant, if that was necessary, for this construction.

That Act is entitled "An Act respecting short forms of conveyances," and the *form* of deed is given in the schedule to which that Act refers, thus—"This indenture, made the —— day of ——, in pursuance of the Act to facilitate the conveyance of real property."

We have here what may be regarded as a legislative declaration, that the words, "in pursuance of the Act to facilitate the conveyance of real property," is an appropriate and proper reference to an Act having for its title "An Act respecting short forms of conveyances." That is the very point here.

I have no doubt that the lease contains a sufficient reference to the Statute 92 of the Consolidated Statutes.

GALT, J., concurred.

Rule discharged.

HOUSE V. HOUSE.

*Promissory note—Stamps—33 Vic. ch. 13, sec. 12, 37 Vic. ch. 47, sec. 2—
Account stated—Statute of Limitations—Evidence.*

In an action on a non-negotiable promissory note made by the defendant to the plaintiff for \$4,000, dated the 7th December, 1872, it appeared that the note when made had no stamps; but that afterwards in July, 1874, the plaintiff shewed the note to her attorney, who informed her that it should have been stamped, and told her to affix stamps for the double duty. Through some misunderstanding, she affixed only single stamps; and afterwards in September, 1874, she sent the note to the attorney, when he having discovered this, acting as plaintiff's agent, affixed the required double stamps.

Held, that the plaintiff was not a "subsequent party to the note," or a "holder without becoming a party," within 33 Vic. ch. 13, sec. 12, so as to have enabled her to have affixed the double duty, and rendered the note valid, although she might have made it valid by affixing, as agent for the maker, stamps for the single duty, when the note was delivered to her. *Escott v. Escott*, 22 C. P. 305, adhered to, and *Woolley v. Hunton*, 33 U. C. R. 152, dissented from.

Held, however, under 37 Vic. ch. 47, sec. 2, that the double stamps affixed to the note in September, after the passing of the Act, by the attorney, as plaintiff's agent, rendered the note valid, for that plaintiff then first acquired knowledge within the Act of stamps being necessary, it being found by the learned Judge that her previous omission to affix them, was through error and mistake, and without any intention on her part to violate the law.

In this case, it was proved that, in 1872, when the note was given, an account was stated between plaintiff and defendant, the sum found due being \$4,000, the amount of the note, which was made up of the principal sums advanced from time to time, and of the interest on those sums, which it was then agreed should be converted into principal. *Held*, sufficient to take the case out of the Statute of Limitations.

Held, also, however, that the statute never applied at all, as it was proved that in 1866, before the lapse of six years, the plaintiff and defendant met together and stated an account in writing, at \$1,923; and that when the second accounting took place in 1872, being within six years of the former accounting, it was agreed that in the new account, the former account should constitute an item, the written acknowledgment of which was given up to the defendant and burned.

The declaration contained two counts. The first count was on a non-negotiable promissory note for \$4,000, dated December, 1872, payable on demand, made by the defendant to the plaintiff, and dated the 7th December, 1872.

The common counts were added.

The defendant, amongst other pleas, pleaded. To the first first count. Third plea: that there was not affixed to the said note at the time of the making thereof, an adhesive stamp or stamps, to the value of \$1.20, or any stamp what-

soever, as required by the statute in that behalf; nor was the said note made on paper stamped in the manner and to the amount of the duty required by the said statute, or to any amount of duty; and the plaintiff did not, after he acquired the knowledge that such stamps were not affixed at the proper time, pay the double duty thereon by affixing to the said note a stamp or stamps to the amount thereof, and writing his initials on such stamp or stamps, and the date on which they were affixed; and the said note, by reason of not having such stamp or stamps, is invalid in law and equity.

To the common counts: The Statute of Limitations.

The plaintiff replied, to the third plea to the first count: that there was not affixed to the said note at the time of the making thereof, an adhesive stamp or stamps, pursuant to the provisions of the statute in that behalf, as by the said plea is alleged; nor was the said note made on paper stamped in the manner and to the amount of the duty required by the said statute, or to any amount of duty, but the plaintiff, as soon as she acquired the knowledge that the provisions of the statute in that behalf had not been complied with as aforesaid, paid the double duty on the said note, by affixing to the said note, stamps to the amount of \$2.40, and duly cancelled the same by inserting thereon, the date of affixing the same and initials of the plaintiff, according to the provisions of the said statute in that behalf.

The plaintiff also replied to the plea of the Statute of Limitations: That the defendant within six years before this suit, made an acknowledgment in writing, signed by him, that the debt in the said count mentioned, remained unpaid and due to the plaintiff.

Upon these replications the defendant joined issue.

The cause was tried before Burton, J., and a jury, at Toronto, at the Fall Assizes of 1874.

From the evidence, it appeared that when the note was made, it was not made on stamped paper, nor had it any stamps affixed to it; but that afterwards, in July, 1874, the

plaintiff called on an attorney, who acted as her legal adviser, and shewed him the note, when he informed her that it should have been stamped, and asked her why this had not been done. The plaintiff stated that she did not know that it was necessary to do so. The attorney then informed her, that in order to make the note valid she must affix double stamps upon it, but the plaintiff misunderstood the instructions given her, and only affixed stamps for the single duty. Afterwards, in September, 1874, the plaintiff sent the note to the attorney, and he then having discovered that only stamps for the single duty had been affixed, he, acting as the plaintiff's agent, affixed the required double stamps, and defaced them in accordance with the provisions of 37 Vic., ch. 47, sec. 12, D.

Evidence was also given to shew that in 1872, when the note was given, an account was stated between the parties, the sum found to be due to the plaintiff being the amount of the note, namely, \$4,000. The amount was made up of the principal sums advanced by the plaintiff to the defendant from time to time; and of the interest upon those sums, which it was then agreed should be converted into principal. It was also proved that the plaintiff and the defendant went to a Mr. Appelbe, a lawyer at Oakville, and instructed him to draw up a mortgage for the \$4000, the amount of the account stated.

It also appeared that in 1866, before six years had elapsed from the opening of the account, the plaintiff and the defendant met together, and stated an account at \$1,923, for which the defendant gave the plaintiff an acknowledgment in writing: that afterwards, in 1872, when the second accounting took place, and which was within six years from the last accounting, the old account was taken as an item in the new account; and that upon the new account being agreed upon, the old written acknowledgment was given up to the plaintiff, and was burned by him.

At the close of the case the counsel for the plaintiff

moved to amend the record by adding a count on an account stated, relying on the account stated in 1872, as taking the case out of the Statute of Limitations.

The learned Judge was of opinion that there was not such an account stated so as to take the case out of the statute, and refused the amendment; but he reserved leave to the plaintiff to move to increase the verdict to that amount, if the Court should be of opinion that there was such an account; and with this view the jury were directed to find whether there was an accounting together in 1872, between the plaintiff and the defendant of the principal advanced from time to time, and of the interest upon those sums, which it was agreed should be converted into principal; and also whether the instructions were given to Mr. Applebe.

The Judge was also of opinion that the note was not properly stamped, and directed a verdict to be given for the defendant on the first count; but reserved leave to the plaintiff to move also on this ground.

The learned Judge reported to the Court that it appeared to his satisfaction that the note was insufficiently stamped by the plaintiff through mere error and mistake, and not with any intention to violate the law; but that on the contrary, as soon as she became aware that stamps were necessary she placed them on the note, but mistook the instructions given her, and thought she had complied with the law by affixing the single duty.

The jury found that there was an account stated in 1872, and also that instructions were given to have the mortgage drawn up, and they gave a verdict for the plaintiff for \$1,339.44, under the common counts, for money lent.

In Michaelmas term, *Beaty*, Q. C., obtained a rule *nisi* on the leave reserved.

In this term *McMichael*, Q. C., shewed cause. There are two questions raised. 1. As to whether the note was properly stamped; and 2. Whether there was such an accounting.

as took the case out of the Statute of Limitations. As to the first point, the evidence shews that when the note was made it was not stamped; but it is contended on behalf of the plaintiff that she only acquired knowledge of the obligation to place stamps upon the note in September, and that proper stamps were then placed upon it, and that the previous omission was caused through error and mistake; and that therefore under 37 Vic., ch 47, sec. 2, the placing of the double duty in September made the note valid. But the evidence shews that when the note was made the plaintiff purposely omitted to place stamps upon it, as it was not intended to be used as a note, but merely as an acknowledgment. However, in June, when Mr. Beaty informed the plaintiff that it was necessary to place double duty, she clearly had knowledge of the stamps required; and therefore, by 31 Vic., ch. 7, secs. 11, 12, D., as amended by 33 Vic., ch. 13, secs. 11, 12, the note not being properly stamped was invalid, and 37 Vic., ch. 47, sec. 2, D., does not apply. As to the second point, there was no accounting so as take the case out of the Statute of Limitations. In order to constitute such an account, there must be items on both sides of the account, and they must be set off against each other, in which case it is held to amount to a payment, and the balance found constitutes a new right of action in respect thereof, and it is not an acknowledgment of a mere existing debt; but not as here, where there are only items on one side: *Ashby v. James*, 1 M. & W. 542; *Jones v. Ryder*, 4 M. & W. 32, overruling *Smith v. Forty*, 4 C. & P. 126; *Chitty on Contracts*, 15th Amer. ed., 1251.

J. H. Cameron, Q. C., and *Beaty*, Q. C., contra. The evidence shews that the reason why the plaintiff only put on single duty, after being told by the attorney to put on double, was that she thought that he meant two stamps, and these she put on. It was not therefore until September, when the attorney, as her agent, put on the double duty, that the plaintiff first acquired knowledge, and the previous omission was clearly through mere error and mistake, and

without any intention to violate the law; the case, therefore, came within 37 Vic., ch. 47, sec. 2, D., and the note was made valid. As to the accounting, *Smith v. Forty*, 4 C. & P. 126, clearly shews that what was done here amounted to an account stated so as to take the case out of the statute. It must also be considered that there was an account stated in writing in 1866, within six years after the account was opened, which was given up in 1871, when the new account was stated; and also the fact of the defendant giving instructions to have the mortgage drawn up. However, it was left to the jury, and they have found that there was an account stated: *Sidwell v. Mason*, 2 H. & N. 306; *Irving v. Veitch*, 3 M. & W. 90; *Taylor on Ev.*, 6th ed., vol. ii., 953-5; *Ryder v. Wombwell*, L. R. 4 Ex. 32; *Walker v. Butler*, 6 E. & B. 506.

GWYNNE, J., delivered the judgment of the Court.

The statutes affecting the question which has been raised upon the replication to the third plea, are the Dominion statutes, 31 Vic., ch. 9, 33 Vic., ch. 13, and 37 Vic., ch. 47.

The note declared upon was made upon the 7th December, 1872, for the sum of \$4,000, payable to Emily House, on demand, without interest. The note not being negotiable, no other person than the defendant, the maker, or the plaintiff, who was the payee, ever was, or ever could have become, a party to the note.

The 4th section of the 31 Vic., ch. 9, enacts that the duty upon a promissory note made in Canada shall be paid by making it upon paper stamped with the amount of the duty, or "by affixing thereto an adhesive stamp or adhesive stamps," &c., "to the amount of such duty, upon which the signature or part of the signature of the maker," &c., "or his initials, or some integral or material part of the instrument shall be written, * * or the person affixing such adhesive stamp shall, at the time of affixing the same, write or stamp thereon the date at which it is affixed. And if no integral or material part of the instrument, nor

any part of the signature *of the maker*," &c., "*nor any date be so stamped or written thereon, or if the date do not agree with that of the instrument, such adhesive stamp shall be of no avail.*"

The 10th section enacted, that, "The stamp or stamps required to pay the duty hereby imposed, shall in the case of a promissory note," &c., "*made * * within Canada, and not made upon paper stamped to the amount of the duty, be affixed by the maker,*" &c., "*thereof.*"

Then the 11th section enacted, that, "If any person in Canada makes," &c., "*any promissory note,*" &c., "*chargeable with duty under this Act, before the duty (or double duty as the case may be), has been paid by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of \$100, and save only in case of the payment of double duty, as hereinafter mentioned, such instrument shall be invalid and of no effect in law or in equity; * * except that any subsequent party to such instrument or person paying the same, may at the time of his so paying or becoming a party thereto, pay such double duty by affixing to such instrument a stamp or stamps, to the amount thereof,*" that is, of the double duty, "*or to the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his signature or part thereof, or his initials, or the proper date, on such stamp or stamps, in the manner and for the purposes mentioned in the fourth section of this Act.*"

The 12th section then made provision for the case of a note not having been stamped at the proper time coming into the hands of an innocent holder with stamps apparently of the proper amount upon it. The section enacted that, "*No party to or holder of any promissory note,*" &c., "*shall incur any penalty by reason of the duty thereon not having been paid at the proper time and by the proper party or parties, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the*

proper party or parties, and that he pays the double duty or additional duty as soon as he acquires such knowledge."

Now that this section could not apply to the payee of a non-negotiable promissory note upon which no stamps at all have ever been placed, appears clear from the proviso, which limits the application of the section to persons receiving a promissory note which, at the time of their receiving it, had stamps upon it apparently to the proper amount, but who had no knowledge that they were not affixed at the proper time.

The section further enacted that "Any holder of such instrument may pay the duty thereon, and give it validity, under section eleven of this Act, without becoming a party thereto."

This portion of the section cannot either apply to the *payee* of a promissory note, who from the time of the note first having existence is a *party to the note*.

The section, as appears to us, applies plainly to a subsequent person becoming the holder of a negotiable instrument after it has become transferable from hand to hand by the *payee's* endorsement, which subsequent holder (the section provides), may pay the double duty and give the note validity, without becoming a *party to the note* by endorsing it.

These sections, 11 and 12 of 31 Vic., ch. 9, are repealed by 33 Vic., ch. 13, and two new sections, numbered 11 and 12, are *substituted* for the repealed sections of the former Act, so as to become part of that Act. The effect, as it appears to us, is to place the several parts of the sections in a more lucid order.

The 11th section still enacts that, "If any person in Canada makes," &c., "any promissory note," &c., "chargeable with duty under *this Act*," (that is 31 Vic., ch. 9, of which the sections of 33 Vic., ch. 13, now forms part), "before the duty, (or double duty as the case may be), has been paid, such person shall thereby incur a penalty of \$100, and *save only in the case of payment of double duty*, as in the next section provided, such instrument shall be invalid, and of no effect in law or in equity."

The 11th section then gathers together the several provisions relative to penalties ; and the 12th section deals with the subject of giving validity to a note which, by reason of want of the proper stamp duty being affixed when the note was made, rendered it, but for this 12th section, wholly invalid, and of no effect in law or in equity.

This section enacts, "That *any subsequent* party to such instrument, or person paying the same, or any *holder* without becoming a party thereto," clearly, as it appears to us in this connection, pointing to a holder becoming such without any necessity existing of his name appearing on the note *as a party*, and so excluding the payee, "may pay *double duty*, by affixing to such instrument a stamp or stamps to the *amount thereof*," namely, of the double duty, "or to the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing *his* signature, or part thereof, *or* his initials, *or* the proper date, on such stamp or stamps, in the manner mentioned in the fourth section of *this Act* ; and when upon the trial of any issue, or on any legal inquiry, the validity of any promissory note," &c., "is questioned by reason of the proper duty thereon not having been paid, or not having been paid by the proper party, or at the proper time, *and* it appears that the holder thereof *when he became holder had no knowledge* that the proper duty had not been paid by the proper party, or at the proper time, such instrument shall nevertheless be held to be legal and valid, if it shall appear that the holder thereof paid the double duty as in this section mentioned, so soon as such holder acquired such knowledge, or if the holder thereof, acquiring such knowledge at the trial or inquiry, do thereupon forthwith pay such double duty; *or* if the validity of such promissory note," &c., "is questioned by reason of a part only of the requisite duty thereon having been paid at the proper time or by the proper party, and it appears to the satisfaction of the Court or Judge, as the case may be, that it was through mere inadvertence or mistake, and without any intention to violate the law on the part of the

holder, that the whole amount of duty, or double duty, as the case may be, was not paid at the proper time, or by the proper party, such instrument," &c., "shall, nevertheless, be held legal and valid, if the holder shall, *before* action brought, have paid double duty thereon, as in this section mentioned, as soon as he reasonably could after having become aware of such error or mistake; but no party who ought to have paid the duty thereon shall be released from the penalty by him incurred as aforesaid."

We confess it does appear to us to be reasonably clear, that Emily House, the plaintiff in this action, the payee of the promissory note declared upon, who from the first moment that the note came into existence and liable to duty was a party thereto and the holder thereof, as the only person to whom it could be paid and who from that time forward is affected with knowledge of the fact that the note had no stamps at all upon it, is not "*a subsequent party*" to such note, or "*a holder thereof, without becoming a party thereto,*" within the meaning of this 12th section.

What is meant by the term "*subsequent party,*" in this section, is not, in our opinion, a person who has a position on the note *posterior* to that of the maker, but a person who at a subsequent period, quite apart from the making of the note, *became a party thereto*, which can only be through the intervention of the payee giving circulation to the note.

It is such a *subsequent party* by endorsement, or a holder claiming through the payee having given the note circulation without such subsequent holder becoming a party to the note at all, who alone, in our opinion, could have given the note validity under this 12th section, if it was invalid for any defect existing for want of proper stamps being affixed at the time of its creation; and the context, as it seems to us, puts this beyond doubt, for the conditions precedent to ability to make a note valid in case, in any suit, a question as to its validity arises are, that the holder, *when he became holder, had no knowledge* that the proper

duty had not been paid by the proper party, or at the proper time, and the invalidity of the note is made conditional upon such holder having paid the double duty, so soon as *such holder* acquired *such* knowledge. A person named as payee of a promissory note, which has no stamps at all upon it, never could fulfil this condition; for at the very first moment of the note having existence the payee is a party thereto, and has the knowledge that the stamps were not affixed by the maker, who was the proper party to affix them. A payee of a promissory note, the moment he receives it, and agrees to take it, which, in our opinion, is the time when the note can be said first to have existence, and to become liable to duty, may well, at that moment, in our opinion, affix and cancel the proper stamp, for single, not double duty, by marking the date upon the stamp, but as the agent of the maker, and not as "*a subsequent party*" to the note, within the 12th sec., of 33 Vic., ch. 13; and if the payee neglect to do so then, and the note has not had stamps upon it affixed and cancelled by the maker himself, the payee cannot, in our opinion, at some subsequent period, make the note valid as "*a subsequent party*" thereto under this section 12. Nor do we see any hardship whatever in holding that a payee who accepts from his debtor a note without any stamps upon it, and who himself neglects to have the proper stamps put upon it when he takes the note, should be reverted to an action against his debtor upon the original consideration for which the note was given, and be held to be incapable to recover upon the note.

This is the view which we took upon demurrer in *Escott v. Escott*, 22 C. P. 305, under the statutes 27 & 28 Vic., ch. 4.

We find now that in the term next after that in which *Escott v. Escott* was decided in this Court, a similar point arose in the Queen's Bench, in *Woolley v. Hunton*, 33 U. C. R. 152, in which Mr. Justice Wilson, delivering the judgment of the Court, expressed a contrary opinion. We confess, however, that, after giving to that case our best

consideration, we remain of opinion that Emma House, as payee of this note, was not a person who, under the designation of "*a subsequent party*," or of "*a holder without becoming a party thereto*," could, under the twelfth section of 33 Vic., ch. 13, have given this note validity; although, in our opinion, at the time of the note being delivered to her, when, as we consider, it first became liable to duty, she might, as agent of the maker, have affixed stamps for the single duty. When, therefore, in July, 1874, under Mr. Beaty's advice that the note required stamps to the amount of the double duty, she, by mistake, affixed stamps to the amount of the single duty, that was, in our opinion, an utterly void act, as it would equally have been if she had then affixed, as directed, stamps to the amount of the double duty. She was not, in our judgment, at that time, in a position to have reinstated, by any act of hers, the validity which was lost by the defect in the note not having proper or any stamps affixed to it when she first took it, and when, in our opinion, it became liable to duty.

But the point seems to have lost its importance; for all difficulty, as it appears to us, has been removed by the recent Act 37 Vic., ch. 47, D.

This Act, which was passed on the 26th May, 1874, repealed the 12th sec. of 33 Vic., ch. 13, and *substituted* therefor another section to operate as the 12th section of the previous Act, 31 Vic., ch. 9, from the 1st day of August, 1874, the day named for the Act to come into operation. It is no longer "*any subsequent party*" to the note, or "*any holder without becoming a party thereto*," who, by paying the double duty, may reinstate the validity of the note,—but "*any holder*" (without any qualification) "*of such instrument may pay double duty by affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his initials on such stamp or stamps, and the date on which they were affixed.*"

It is to be observed that no time is here stated *when* it

shall become incumbent upon the holder to affix the stamps. The section proceeds to provide the course to be pursued in case the validity of the note shall be contested in any suit for want of stamps, or of sufficient stamps, for the protection of innocent holders. The first provision relates to the case of holders who, at the time of their becoming such, have no knowledge of any defect ; and the second for all cases, whether of persons who received the note without knowledge of any defect having at any time existed, or of persons taking a note without any stamps at all upon it, in which case of necessity they would have knowledge of the fact of there being no stamps upon it. This provision applies not merely, as in the former Act, in the case of *part* only of the proper duty having been paid at the proper time, by the proper party, but to cases also where no duty had ever been paid at all.

It is with the latter provision we have to deal here ; and the substance of the section is, so far as we are at present concerned, first, that any holder may pay double duty, without any limitation being stated as to the time when this must be done ; and where, in any suit or proceeding in law or equity, the validity of any such instrument is questioned by *reason* of the proper *duty not having been paid at all*, or not paid by the proper party, or at the proper time, or, &c., if it shall appear to the satisfaction of the Court or Judge that it was through mere error or mistake, and without any intention to violate the law on the part of the holder, that any such defect existed, then such instrument shall be held legal and valid, if such holder shall pay the double duty thereon as soon as he is aware of such error or mistake ; but no party who ought to have paid duty thereon shall be released from the penalty by him incurred as aforesaid.

Now this statute, as it seems to us, refers to errors and mistakes arising from ignorance of law as well as from ignorance of fact ; for it applies to cases of a note taken by a person which had *on it no stamps at all* when he took it, as well as to other cases, and after the 1st of August, 1874,

the statute 33 Vic. must be read as having this substituted section in it in the place of the former one.

The spirit and intent of the Act, in our opinion, is to preserve the validity of the note at the cost of the double duty in favor of all holders who, without any intention to violate the law, may have fallen into error or mistake, whether from ignorance of law or of fact, reserving the liability of the party who ought to have paid the duty, and who did not do so, to the penalty imposed by the statute.

Now, under this Act, it appears to us that this plaintiff had the right, at any time after the 1st of August, 1874, to pay the double duty, and so to reinstate the note, if she could satisfy the Judge that she had not abstained from doing so with intent to violate the law.

The learned Judge, before whom the case was tried, has certified to us upon his notes, that it appeared to his satisfaction that the plaintiff had no intention whatever to violate the law; but that, on the contrary, as soon as she became aware that stamps were necessary, she placed them on the note, but mistook the instructions, and thought she had complied with the law by affixing the stamps for the single duty, which appear upon the face of the note.

Under these circumstances, it appears to us that the affixing the double stamps by the plaintiff's attorney, acting as her agent, upon the 1st September, 1874, which stamps are defaced in the manner pointed out by the new substituted 12th section, of the 37 Vic., ch. 47, prescribed to be the 12th section of 33 Vic., is a sufficient compliance with that Act, and that therefore the plaintiff is entitled to recover upon the count on the note.

As to the other point, we are of opinion that the count upon an account stated ought to be allowed, and that the finding of the jury entitles the plaintiff to recover for the amount for which the note was given, as upon an account stated. The jury has expressly found that there was an accounting together between the plaintiff and defendant of the principal advanced from time to time, and of the interest upon those sums, which it was *then* agreed should be

converted into principal; and that the plaintiff and defendant afterwards went to Mr. Appelbe, and instructed him to prepare a mortgage for the \$4,000. The agreement upon the part of the defendant to allow interest upon the principal sums from time to time advanced, and to convert that interest into principal, and his acknowledgment of the two sums combined as a new debt, is sufficient, in our judgment, to entitle the plaintiff to recover upon an account stated.

This conclusion is not at all at variance with *Jones v. Ryder*, 4 M. & W. 32. There Parke, B., says: "Nothing appears from this statement, to shew that the parties intended to convert the interest then due into principal; if it had, perhaps the case of *Smith v. Forty*, 4 C. & P. 126, might apply."

Until the account was stated, and the defendant agreed that the interest should be allowed, and added to the principal, to constitute a new debt, and that \$68 should be struck off to make the debt \$4,000, there was no such old *existing debt* as that comprised in the account stated. This account stated is not an acknowledgment by words only, of a pre-existing debt, but it is the creation of a *new debt*. But, in truth, when we read the evidence of the plaintiff, upon which it is plain the jury proceeded, it appears that in 1866, before the lapse of six years, there had been an accounting between the plaintiff and the defendant, wherein the debt of the defendant was acknowledged in writing to be \$1,923; and that the second accounting took place again within six years, in which the former accounting constituted an item, and that upon the new accounting the old written acknowledgment was given up to the defendant and burned by him.

Had this fact been found by the jury, as it was admitted it would have been had the question been pointedly put to them, for the evidence of it, is the evidence of the person whose evidence upon the point which was submitted to the jury they have wholly adopted, the Statute of Limitations never applied at all.

The rule will be for judgment for the plaintiff upon the promissory note, as also upon an account stated, which the plaintiff is to be at liberty to add to the record, and the damages, by consultation with the learned Judge, we find to be \$4,251.

Rule accordingly.

NOXON ET AL. V. HOLMES ET AL.

Division Court jurisdiction—Cause of action—C. S. U. C. ch. 19, sec. 71.

“Cause of action,” within the Division Court Act, C. S. U. C. ch. 19, sec. 71, means the “whole cause of action:” and therefore where the plaintiffs sued defendant in the Division Court, at Ingersoll, in the County of Oxford, on a promissory note, payable there, but made at Strathroy, in the County of Middlesex, where defendant resided: *Held*, that as the whole cause of action did not arise at Ingersoll, the action would not lie there, but should have been brought at Strathroy, where defendant resided; and that a prohibition was properly ordered.

Vaughan v. Wellon, L. R. 10 C. P. 47, and the cases on the C. L. P. Act, sec. 44, distinguished.

In this term *S. Richards*, Q. C., obtained a rule *nisi* to rescind an order of Galt, J., made in Chambers on the 23rd December last, directing a prohibition to issue to prohibit the Judge of the County Court of the County of Oxford from further proceeding in a plaint, in the 5th Division Court of that county.

The plaint was at the suit of the Messrs. Noxon, a manufacturing company, against Holmes & Shield, as makers of a note, dated “Ingersoll, Ontario, December 30, 1872, payable to the plaintiffs or order, at their office in Ingersoll, \$110, &c.

Ingersoll is in Oxford. The defendants live at Strathroy, in the adjoining County of Middlesex.

It was proved that this note, though dated at Ingersoll, was really made at Strathroy, and was given for goods purchased from the plaintiffs’ agent in Strathroy.

It was objected that as the contract was actually made in Middlesex, and both of the defendants resided in that county, there was no jurisdiction.

In the same term *Hector Cameron*, Q. C., shewed cause. The learned Judge was quite right in granting the prohibition, as it clearly appears that the cause of action did not wholly arise in the County of Oxford, for the contract was made at Strathroy, in the County of Middlesex, and the parties reside there. The action should therefore have been commenced there. The cases in our Courts are decisive upon the subject, and shew that the whole cause of action must arise in the Court in which the action is brought, and not the breach alone: *McGiverin v. James*, 33 U.C.R. 203; *Watt v. Van Every*, 23 U. C. R. 196; *Kemp v. Owen*, 14 C. P. 432; *Carsley v. Fiskien*, 4 P. C. 255. In the case of *Vaughan v. Weldon*, in the Weekly Notes for December 5, 1874, p. 210 (a), the English Courts seemed to have come to the conclusion that the breach of the contract arising within the jurisdiction was sufficient; but this is not the decision of a Court of Appeal, and is not binding on our Courts.

S. Richards, Q. C., contra. In the case of *Vaughan v. Weldon*, in the Weekly Notes, (a), the Judges of the Court of Queen's Bench, Common Pleas, and Exchequer, after conference, decided that the breach of a contract arising within the jurisdiction was sufficient to enable the Court to entertain the matter. This case being a decision of the three Courts, our Courts are certainly bound by it.

HAGARTY, C. J.—The statute says, "Any suit may be entered and tried in the Court holden for the division in which the cause of action arose, or in which the defendant, or any one of several defendants, resides or carries on business at the time the action is brought."

My brother Galt acted on the express authority of *Watt v. Van Every*, 23 U. C. R. 196, where the words, "cause of action," were held to mean the whole cause of action—in other words, what the plaintiff must prove to entitle him to recover; also on *McGiverin v. James*, 33 U. C. R. 203, where the authorities are reviewed.

(a) Since reported in L. R. 10 C. P. 47.

The latter case was to the effect that on the contract made in Ontario and the breach in Liverpool, the plaintiff might sue in Ontario, on service of a process made in England. That decision was on the clause in the C. L. P. Act. sec. 44; "Upon the Court or Judge being satisfied that there is a cause of action which arose in Upper Canada, or in respect of the breach of a contract made therein;" and the decision does not necessarily affect this case.

Kemp v. Owen, 14 C. P. 432, accords with *Watt v. Van Every*. So, also, *Carsley v. Fiskien*, 4 P. R. 255.

The distinction between the words used in the Division Court Act and those in the C. L. P. Act must not be overlooked.

The Imperial Act, on which several decisions were made, 9 & 10 Vic., ch. 95, sec. 60, enacts that the summons "may issue in any district in which the defendant, or one of the defendants shall dwell or carry on his business," &c., "or by leave of the Court for the district in which the defendant, or one of the defendants shall have dwelt or carried on his business at some time within six calendar months next before the time of the action brought, *or in which the cause of action arose*, such summons may issue on either of such last-mentioned Courts."

I have seen no decision on this Act which does not hold "cause of action" to mean "whole cause of action."

Borthwick v. Walton, 15 C. B. 501, is elaborately argued on the authorities. Jervis, C. J., says, at page 510: "It has been decided over and over again that the 'cause of action' in the 9 & 10 Vic., ch. 95, sec. 60, means 'the whole cause of action.'" Maule, J., is to the same effect: "Upon the critical construction of the words of the 60th section, as well as upon the spirit of the enactment I think it clearly means the whole cause of action. And there is good reason for this. A defendant is liable to be sued in the place where he resides, and where the whole contract or cause of action arises. That is a thing that he can and is bound to take notice of; and it is convenient. The words of the section are plain and simple.

When the Legislature mean to deal with part of the cause of action—as in sec. 128—they knew how to express themselves. * * Everything that is requisite to shew the action to be maintainable, is part of the cause of action.”

In *Wilde v. Sheridan*, 21 L. J. N. S. Q. B. 260, Sir J. Coleridge held that the Norwich County Court had no jurisdiction to try an action on a bill, drawn by the plaintiff in Norwich on the defendant in London, and accepted and payable there, and returned by him to the plaintiff at Norwich, the whole cause of action not arising in the Norwich jurisdiction.

This case was for the price of goods shipped by rail to the defendant in one county, but on an order given by him in another county, where he resided.

Hernaman v. Smith, 10 Ex. 659, is to the same effect.

Parke, B., at page 666, says: “The term, ‘Cause of action,’ means all things necessary to give a right of action, whether they are to be done by the plaintiff or a third person.”

The English Court of Queen’s Bench, in *Cherry v. Thompson*, L. R. 7 Q. B. 573, considered that the words in the C. L. P. Act, a “cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction,” involved the distinction between actions *ex delicto*, and *ex contractu*: in an action of tort, where the whole cause of action arises in England—in an action of contract, where the contract has been made in England, without regard to where the breach may occur, but still only where the contract has been made in England. And the Judges express themselves as quite unconvinced by the reasoning of the judgment of the Common Pleas in *Jackson v. Spittall*, L. R. 5 C. P. 542.

The judgment in the latter case has been recently adopted by the majority of the English Judges in *Vaughan v. Weldon*, in the Weekly Notes for December 5, 1874, at p. 210, as the rule to govern in future; but we are still without a full report of the case (a).

(a) Since reported in L. R. 10 C. P. 47.

In *Jackson v. Spittall*, L. R. 5 C. P. 542, Brett, J., rests much on the peculiar wording of the Act. He says that the phrase, "cause of action" is made applicable to two subsidiary phrases. He says, at p. 552: "If the section were expanded, it would read thus: 'That there is a cause of action which arose within the jurisdiction, or a cause of action in respect of the breach of a contract made within the jurisdiction.' In the second collocation the phrase, 'cause of action,' clearly does not mean the whole cause of action, as contended for on behalf of the defendants. It means the breach of contract, which breach occurs out of the jurisdiction. But, if the phrase 'a cause of action,' when applied to the second subsidiary phrase, does not mean the whole cause of action in the sense contended for, can it be properly said to have that sense when applied to the first subsidiary phrase? Can the same phrase have two different meanings? Is not the natural reading rather this, that it means the same thing, when applied to both? It is that which in popular meaning,—for many purposes, in legal meaning,—is 'the cause of action,' namely, the act on the part of the defendant which gives the plaintiff his cause of complaint. In the first collocation, that is supposed to occur within the jurisdiction, in the second, without the jurisdiction."

Now, if this decision be based on the peculiar wording of the two cases of jurisdiction in the C. L. P. Act, and not on the mere effect of the words, "cause of action," standing alone, it is not a direct authority for us.

Referring to a contrary decision of the Exchequer, *Sichel v. Borch*, 2 H. & C., 954 Brett, J., says, at p. 547: "Pollock, C.B., referring evidently to the cases upon the construction of the County Court Acts, stated that it had been laid down in an analogous matter that the term 'cause of action' means 'the whole cause of action' * * The attention of the Court was not called to the difference of rule applicable to the construction of statutes in questions of jurisdiction affecting Superior and Inferior Courts."

A case of *Fife v. Round*, 6 W. R. 293, in the Exchequer,

10 Ex. 717, is also noticed. A note made in France was there delivered to the plaintiff. In the margin it was made payable at a London bank, where it was dishonoured.

Bramwell, B., made an order, under the C. L. P. Act, allowing the plaintiff to proceed. It was argued that the cause of action did not arise in England, and the County Court cases were cited. The Court upheld the order, Pollock, C. B., and Martin, B., both stating that the cases on the construction of the County Court Acts, did not apply. This was not cited in *Sichel v. Borch*.

In *Durham v. Spence*, L. R. 6 Ex. 46, Pigott, B., says, at p. 47: "After full consideration I adopt the view taken by the Court of Common Pleas in *Jackson v. Spittall*, L. R. 5 C. P. 542. * * I understand by 'cause of action' that which creates the necessity of bringing the action * * That this was the intention of the Legislature, I think, appears from the alternative case put in the section, which allows of redress being obtained in England for a breach of a contract which was made here, although the breach may have taken place abroad * * I think we are not justified in introducing into the section a word not found there, and saying that when the Legislature says *cause of action*, it means *whole cause of action*, and not that which the words used naturally express, namely, the fact which gives rise to the action."

Cleasby, B., takes a like view, considering the judgment in *Jackson v. Spittall* quite unanswerable, especially noticing the argument as to the alternative remedy, as to the cause of action and the breach of contract.

But both he and Pigott, B., speak of the words, "cause of action," as meaning less than "whole cause of action." Kelly, C. B., takes the Queen's Bench view.

In the recent case of *Vaughan v. Weldon*, in the Weekly Notes (a), a decision of the Common Pleas, it was announced that the Judges of all the Courts have determined to follow the view of the Common Pleas as expressed in *Jackson v. Spittall*, it being understood that the Court of Queen's

(a) Since reported in L. R. 10 C P. 47.

Bench yield for the sake of order, and not from conviction.

In *Lloyd's County Court Practice*, 7th ed., p. 75, it is said: "The cause of action on a bill of exchange cannot be said to have wholly arisen within the jurisdiction of a County Court, unless it appears that everything that is material to support the action has arisen within the district. In general the safest course will be to bring the action in the Court of the district where the defendant dwells or carries on his business."

In the case before us the note was made in Middlesex. All the plaintiff had to do was to produce it, and prove the making. They had not to shew the doing or the non-doing of anything in Oxford, where it was payable. That would be matter of defence.

Cooke v. Gill, L. R. 8 C. P. 107 is very direct. Brett, J., says, at page 116: "Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse."

This was a case of bills drawn abroad by defendant on a bank within the jurisdiction, endorsed to plaintiffs, who had their place of business in the jurisdiction.

Prohibition was granted. Bills and notes are declared to be under the general rule, as to the whole cause of action.

See, also, the elaborate judgment of Willes, J., in *Mayor, &c., of London v. Cox*, L. R. 2 H. L. Ca. 239.

On the whole, I do not see that the late agreement of the Judges to abide by *Jackson v. Spittall*, L. R. 5 C. P. 542, can govern the present point, which arises wholly on the Division Court Acts.

It must be decided, I think, on the state of the authorities before the late case. We may use the view of the majority of Judges as conclusive on the meaning of the absent defendant clauses in the C. L. P. Act, but it cannot be the rule of decision here.

We must look on this as the case of a limited jurisdiction given by statute to an Inferior Court, and that is confined to cases where the cause of action arises in the

jurisdiction. In such cases, it seems to me, that "cause of action" means the "whole cause of action," according to the authorities.

As remarked before, there are numerous dicta to the contrary; but the general result is, I think, to the effect above stated.

Since writing the above, my brother Burton has called my attention to a case of *Smith v. Henderson*, decided in the Common Pleas, February 1st, this year. We have as yet only seen it in the newspapers. It was a case of prohibition to the Mayor's Court, on the ground that the causes of action did not wholly arise in the jurisdiction.

The goods had been ordered by the defendant by letter from Berkshire to the plaintiff in London. It was held that the rule for prohibition must be absolute; that it was plain that certain material letters were written or received outside the jurisdiction of the Court; and that "cause of action" had been interpreted to mean every material fact which the plaintiff was bound to prove.

It is much to be regretted that the learned counsel who appeared in this case did not favour the Court with any reference to or argument on the numerous cases which we have had to consult in determining a question of this very general interest.

GWYNNE, J.—The cases which are decisive of the point before us are those in our own Court: namely, *Watt v. Van Every*, 23 U. C. R. 196, and *Kemp v. Owen*, 14 C. P. 432, which are in accord with the decisions in England, as to the jurisdiction of the County Court. The case of *Vaughan v. Weldon*, recently decided in England, reported in the Weekly Notes (a), wherein it is said, that all the Courts have concurred in adopting the decision of the Court of Common Pleas in *Jackson v. Spittall*, L. R. 5 C. P. 542, has really no bearing upon the point, as it relates exclusively to the construction of the terms, "cause of action which arose," as used in the Common Law Procedure Act in relation to service out of the jurisdiction.

(a) Since reported in L. R. 10 C. P. 47.

There is no incongruity whatever, rather the contrary, in adhering to the decisions in relation to the jurisdiction of the inferior Courts, notwithstanding the conclusion of the Courts in England, as announced in *Vaughan v. Weldon*.

GALT, J., concurred.

Rule discharged.

BURGESS V. TULLY ET AL.

Division Court judgment—Transcript to County Court.

Held that, under the Division Courts Act, C. S. U. C., ch. 19, secs. 142, 143, 145, an execution against goods and chattels must first issue out of the Division Court in which judgment was originally recovered, and be returned *nulla bona*, before a transcript of the judgment can be transmitted and filed in a County Court.

Where, therefore, without the issue of such execution and its return *nulla bona*, a transcript was filed in the County Court, under which plaintiff's lands were seized by the sheriff, and sold: *Held*, that the sale was void.

EJECTMENT to recover possession of lot No. 1, in the 4th concession of the Township of Smith, in the County of Peterborough.

The plaintiff claimed title as patentee of the Crown, and the defendants under a deed from the sheriff of the county of Peterborough.

The cause was tried before Morrison, J., without a jury, at Peterborough, at the Fall Assizes of 1874.

It appeared that the defendant, on the 4th October, 1861, recovered a judgment in the Third Division Court for the United Counties of Northumberland and Durham, against the plaintiff, for \$39.71 damages, and \$3.67 costs. There was no execution issued on this judgment out of the Third Division Court; but on the 30th of October a transcript of the judgment was issued out of the said Division Court by the Clerk thereof, and sent to J. Hall, Clerk of the First Division Court for the United Counties of Peterborough and Victoria.

On the 5th January, 1862, the Clerk of the Third Division Court of Northumberland and Durham, gave a transcript

of the judgment, which, after stating the recovery of the judgment and transmission of the said transcript, proceeded as follows :

"On the 8th day of November, 1861, the said J. Hall issued execution for £11 1s. 2d., besides the interest, and handed to Charles Stapleton, Bailiff of the First Division Court for the United Counties of Peterborough and Victoria ; and on the 7th day of December, 1861, the following return was made by the said Charles Stapleton, Bailiff, namely, 'No goods liable to seizure.' Which return was forwarded to me by J. Hall, Esq., Clerk aforesaid, on the 14th December, 1861, pursuant to the 37th section of the Consolidated Statutes of Upper Canada :

"I, John Day, Clerk of the said Division Court for the United Counties of Northumberland and Durham, do hereby certify and declare that the foregoing is a faithful transcript of the judgment and proceedings in the above cause, as shewn and as appears by the original entries and records of the Court.

"Given under the seal of the said Court, this 25th January, 1862."

This transcript was filed in the office of the Clerk of the County Court of the United Counties of Peterborough and Victoria, and such proceedings were taken thereon that the land of the plaintiff, which is the subject of the present action, was sold by the sheriff to the defendants.

It is unnecessary to particularize these proceedings, as the judgment of the Court does not turn upon them.

The learned Judge entered a verdict for the plaintiff, reserving leave to the defendants to move to enter a verdict for them.

In Michaelmas Term, *Armour*, Q. C., obtained a rule *nisi* on the leave reserved.

In this term, *Hector Cameron*, Q. C., shewed cause. The sale was clearly bad, as the requisites of the Division Court Act, Consol. Stat. U. C., ch. 19, sec. 142, had not been complied with so as to enable the sheriff to sell. Under sec. 139,

the judgment having been transmitted to the First Division Court of the United Counties of Peterborough and Victoria, it became the judgment of that Court, and therefore the transcript should have been by the Clerk of that Court. If, however, the judgment remained the judgment of the Third Division Court of Northumberland and Durham, then the transcript was invalid. In order to obtain execution against lands, execution against goods must first issue in the original Court and be returned *nulla bona*, and the transcript must set out these facts, which has not been done here, and the only recital of an execution being issued and returned is that of the Clerk of the First Division Court of Peterborough and Victoria, of which the Clerk of Northumberland and Durham could have no personal knowledge; *Farr v. Robins*, 12 C. P. 35; *Jacomb v. Henry*, 13 C. P. 377; *Hope v. Graves*, 14 C. P. 393.

Armour, Q. C., contra. Under sec. 139, the judgment still remained the judgment of the Third Division Court of Northumberland and Durham, as the sending a transcript under that section is not a transmission of the judgment itself, but the judgment remains in the original Court. The object of the transcript is to give the foreign Clerk all the information necessary to enable him to enforce the judgment in his Court, and there is nothing to prevent transcripts being sent to as many counties as a plaintiff may desire. Under the 143rd section it is different, for this section expressly provides that on filing the transcript in the County Court it shall become a judgment of that Court. The judgment therefore remained the judgment of the original Court, and the transcript was properly sent from it. The transcript itself was perfectly regular. It was not necessary that execution should have issued out of the original Court. The Clerk of the Court at Peterborough was the officer of the Clerk of the Third Division Court of Northumberland and Durham, and he gives his certificate of what he has done, and then the Clerk makes up his transcript containing the information regularly obtained from his officer. The cases cited by the other side do not

apply, as there the transcripts were clearly irregular. The sheriff's deed was *prima facie* regular, and the onus was on the plaintiff to shew that it was irregular, which he has failed to do : *Low v. Hicks*, 21 C. P. 113.

GALT, J.—From the evidence it appears that the defendant obtained a judgment in the Third Division Court of Northumberland and Durham, on which no *fi. fa.* against goods was issued, but that shortly afterward a transcript of the judgment was sent to the Clerk of the First Division Court of Peterborough, who afterwards *reported* to the Clerk of the Third Division Court of Northumberland and Durham that he had issued an execution thereon, and delivered the same to the bailiff, who had returned, “no goods liable to seizure;” and that subsequently a transcript of the judgment was given by the Clerk of the Third Division Court, setting forth the facts, which was filed with the Clerk of the County Court of the United Counties of Peterborough and Victoria, and the lands of the plaintiff sold thereunder.

The sections of the Division Court Act, Consol. Stat. U. C., ch. 19, to which it is necessary to refer, are secs. 139, 142, 143 and 145.

Sec. 139. “The Clerk of any Division Court shall, upon the application of any plaintiff or defendant, (or his agent), having an unsatisfied judgment in his favour in such Court, prepare a transcript of the entry of such judgment, and shall send the same to the Clerk of any other Division Court in any other County, with a certificate at the foot thereof signed by the Clerk who gives the same, and sealed with the seal of the Court of which he is Clerk, and addressed to the Clerk of the Court to whom it is intended to be delivered, and stating the amount unpaid upon such judgment and the date at which the same was recovered; and the Clerk to whom such certificate is addressed shall, on the receipt of such transcript and certificate, enter the transcript in a book to be kept in his office for the purpose, and the amount due on the judgment according to the certificate; and all the proceedings may be taken for the

enforcing and collecting the judgment in such last mentioned Division Court, by the officers thereof, that could be had or taken for the like purpose upon judgments recovered in any Division Court."

This forms part of the 3rd sec. of 18 Vic., ch. 125.

Sec. 142. "In case an execution be returned *nulla bona*, and the sum remaining unsatisfied on the judgment under which the execution issued amounts to forty dollars, the plaintiff or defendant may obtain a transcript of the judgment from the Clerk under his hand and sealed with the seal of the Court, which transcript shall set forth :

"1. The proceedings in the cause ;

"2. The date of issuing execution against goods and chattels ; and

"3. The bailiff's return of *nulla bona* thereon as to the whole or a part.' " (13 & 14 Vic. ch. 53, sec. 57.)

Sec. 143. "Upon filing such transcript in the office of the Clerk of the County Court in the county where such judgment has been obtained, or in the county wherein the defendant's or plaintiff's lands are situate, the same shall become a judgment of such County Court, and the Clerk of such County Court shall file the transcript on the day he receives the same, and enter a memorandum thereof in a book to be kept by him provided for that purpose, which memorandum shall contain :

"1. The names of plaintiff and defendant ;

"2. The amount of the judgment ;

"3. The amount remaining unsatisfied thereon ; and

"4. The date of filing." (13 & 14 Vic. ch. 53, sec. 57.)

Sec. 145. "Upon such filing and entry the plaintiff or defendant may, until the judgment has been fully paid and satisfied, pursue the same remedy for the recovery thereof or of the balance due thereon, as if the judgment had been originally obtained in the County Court." (13 & 14 Vic., ch. 53, sec. 57.)

Secs. 142, 143 and 145 are consolidated from the 57th sec. of 13 & 14 Vic., ch. 53, and as they do not embrace all its provisions, I quote it at length: "And whereas it is

expedient that judgment exceeding ten pounds in the said Courts shall in certain cases affect lands, and that execution should issue in certain cases against lands on judgments obtained in any Division Court, be it enacted, that whenever judgment is rendered in favour of any plaintiff or defendant in *any* Division Court under this or any former Act hereby repealed, and any execution *therein* issued shall or may have been returned *nulla bona*, it shall be lawful for such plaintiff or defendant to obtain a transcript of such judgment from the Clerk of *such* Court, under his hand and sealed with the seal of the *said* Court, which transcript shall set forth the proceedings in the cause, the date of issuing execution against the defendant's or plaintiff's goods and chattels, and the bailiff's return of *nulla bona* thereon, as to the whole or a part; and upon filing such transcript in the office of the Clerk of the County Court in the county where such judgment shall have been obtained, or in the county wherein the defendant's or plaintiff's lands are situate, the same shall become and is hereby declared to be a judgment of the said County Court, and the said Clerk of the County Court is hereby required to file the said transcript of judgment on the day of the month on which he receives the same, * * and upon such filing and entry as aforesaid, the plaintiff or defendant shall, until the judgment be fully paid and satisfied, be entitled to pursue the same remedy for the recovery of the same or the balance due thereon, as if the judgment had been originally obtained from the County Court," &c.

The cases of *Farr v. Robins*, 12 C. P. 36; *Jacomb v. Henry*, 13 C. P. 377, and *Hope v. Graves*, 14 C. P. 393, establish that in order to support a sale under an execution against lands issued from a County Court upon a judgment based on a transcript from a Division Court, it is absolutely necessary that the provisions of the Division Court Act respecting transcripts should be strictly followed.

There were several objections raised as to the transcript in this case: first, that the transcript should have been sent

from the First Division Court of the County of Peterborough, and not from the Third Division Court of Northumberland and Durham, as the case had been transferred to the former from the latter; second, that the Clerk of the Third Division Court could not certify to the issuing of a *fi. fa.* goods and a *nulla bona*, on the report of the Clerk of the foreign Division Court, and consequently that the transcript did not comply with the second and third requirements of the 142nd section; and third, that there was no *fi. fa.* goods issued from the Third Division Court.

It is to be observed that under the provisions of the 13 & 14 Vic., ch. 53, sec. 57, for which secs. 142, 143, and 145, of the Consol. Stat., ch. 19, are substituted, it was necessary that an execution against goods should have been issued out of the Court in which the judgment was originally recovered, and a return of *nulla bona* made, before any transcript could be filed in the County Court.

The 142nd section does not expressly require this, but it uses the following words: "In case an execution be returned *nulla bona*."

In my opinion, this must mean an execution from the original Court, bearing in mind what the provisions of the original Act were, and also that the 139th section, which precedes it, is a consolidation of a statute passed several years subsequently, and with an entirely different object.

That statute, the 18 Vic., ch. 125, is entitled, "An Act to extend the jurisdiction of the Division Courts of Upper Canada," and has no reference whatever to transmitting transcripts of judgments to County Courts, the effect of the statute being to make one Division Court ancillary to another, in order to obtain payment of judgments, and not in any way to interfere with the steps necessary to be taken before a Division Court judgment could be made a judgment of the County Court.

This being clearly the law at the time of the consolidation, I think that we should read the Consolidated Statute in accordance with that view, unless the words of the consolidating Act are clearly at variance with it, which does not appear to me to be so in this case.

That an execution against goods must have been issued from the original Court is manifest, not only from the words of the 57th sec. of 13 & 14 Vic., ch. 53, but because there was not at that time any statute which authorized the transmission of a transcript from one Division Court to another.

It was contended by Mr. Cameron that under the provisions of 18 Vic., as soon as a transcript was sent from one Division Court to another, the latter Court was invested with all the powers necessary for enforcing and collecting such judgment, the words being: "and all other proceedings shall and may be had and taken for the enforcing and collecting the judgment in such Division Court, by the officers thereof, that can be had or taken under the Upper Canada Division Courts Acts, upon judgments recovered in any Division Court, for the like purpose."

I confess that this argument would seem to be well founded, but for the objection that by the 142nd section it is required that the transcript of a judgment, filed in a County Court, must contain "the proceedings in the cause," and it is not possible for the Clerk of the ancillary Court to insert them in a transcript to a County Court.

The result would therefore appear to be that, for the purpose of enforcing payment in a Division Court, advantage may be taken of the authority of any other Division Court; but to obtain the aid of a County Court, it is necessary that the proceeding should be taken in the original Court, in which case it should be expressly shewn that an execution had been issued out of that Court, and returned *nulla bona*.

I confess I do not see any difficulty in meeting the requirements of the statute in cases where a transcript has been sent to a foreign Court.

I can well understand that in giving "the proceedings in the cause" the Clerk may mention, as was done in the present case, that a transcript had been sent to another Court, and that it had been reported to him by the Clerk

of that Court that an execution had been issued and returned *nulla bona*, because it was a proceeding in the cause, and it is a matter of no consequence if nothing was done under it. But as the 142nd section requires that the transcript to a County Court should contain a certificate under the hand of the Clerk, and *sealed with the seal of the Court*, of the date of issuing execution against goods and chattels, and the bailiff's return of *nulla bona* thereon, it appears to me that such certificate must refer to the records of the Court, and not to a mere report of what had taken place, furnished to the Clerk by some other person.

I was at one time under the impression that this was a *casus omissus* in the law, but a careful consideration of the different statutes satisfies me that it is not.

It appears to me that the law regulating cases like the present is, that upon recovery of a judgment in a Division Court, the plaintiff may at once transmit a transcript of the judgment to a foreign county, and upon that proceeding being ineffectual, he may resort to a County Court, but before doing so, he must sue out an execution against the defendant's goods from the original Court, and such execution must be returned *nulla bona*, in order that the requirements of the statute may be complied with by the Clerk.

I think, therefore, that this rule should be discharged.

GWYNNE, J.—Upon the best consideration that I have been able to give to the embarrassing and perplexing point raised in this case, I am of opinion, upon a careful perusal of all the statutes bearing upon the subject, that our judgment will best accord with the decisions in *Farr v. Robins*, 12 C. P. 35; *Jacomb v. Henry*, 13 C. P. 377, and *Hope v. Graves*, 14 C. P. 393, if we hold, as I think we must, that the plaintiff has not been divested of his estate in the lands for the recovery of which this action is brought.

By the Division Courts Act, 13 & 14 Vic. ch. 53, sec. 57, A.D. 1850, after reciting that "it is expedient that judgments exceeding ten pounds in the said Courts shall in

certain cases affect lands, and that execution should issue in certain cases against lands on judgments obtained in any Division Court," it was enacted "That whenever judgment is rendered in favour of any plaintiff or defendant in any Division Court under this or any former Act hereby repealed, and any execution therein issued shall or may have been returned *nulla bona*, it shall be lawful for such plaintiff or defendant to obtain a transcript of such judgment from the Clerk of such Court, under his hand and sealed with the seal of the said Court, *which transcript shall* set forth the proceedings in the case, the date of issuing execution against the defendant's or plaintiff's goods and chattels, and the bailiff's return of *nulla bona* thereon, as to the whole or a part; and upon filing such transcript in the office of the Clerk of the County Court in the county where such judgment shall have been obtained, or in the county wherein the defendant's or plaintiff's lands are situate, the same shall become and is hereby declared to be a judgment of the said Court."

Now this statute made Division Courts, in other counties than the county in which the Division Court in which the judgment was obtained is situate, ancillary, in certain cases, to the Division Court in which the judgment was obtained; for the 55th section enacted, "That if any person against whom a judgment shall or may have been entered up in any Division Court in any county in Upper Canada, shall remove to another county therein without satisfying the said judgment, it shall be lawful for the Judge of the Division Court of the county to which the said party has removed, to order an execution for the debt and costs, for which judgment has been rendered in another county against such party, to issue against such party, upon the production of a copy of such judgment duly certified by the Judge of the county in which the judgment has been entered."

By the 53rd section a *fieri facias* issued upon any judgment in a Division Court extended over all the goods and chattels of the party against whom the execution issued, which were situate within the county in which the Division Court in which judgment was obtained was situate.

These clauses taken together seem to me to contemplate that an execution should first issue out of the Division Court in which judgment was obtained, regarding the defendant as residing in that county, but that if this execution should fail of effect by reason of the defendant having removed to another county, then that a copy of the judgment being certified by the Judge of the county wherein the judgment was obtained, the Judge of another County Court, upon being satisfied of the removal of the defendant to his county, might issue an execution.

No provision is made by the Act for this execution when returned being transmitted to the Clerk of the Court, wherein the judgment was obtained, for the purpose of being kept by him among the papers in the cause.

It is, I think, then plain that the execution to be certified to a County Court as having been issued and returned under this 57th section, was an execution issued by the Clerk of the Court wherein the judgment was obtained. He undoubtedly is the person who was to sign and transmit the transcript. The transcript is directed to be obtained from the Clerk of such Court—namely, the Court wherein judgment was obtained; and he is to certify the *issuing of an execution*, which he alone could do by its being issued out of his own Court, he having no knowledge, and not being in a position to have knowledge of what was done in the other county, if a copy of judgment had been certified under the 55th section.

I am rather inclined to think, inasmuch as there is no provision whatever made by the statute for the transmission to the Clerk of the Court wherein judgment was obtained of anything done under an execution issued in another county to which the defendant had removed so that he could certify it at all under the 57th section to a County Court, that a party, after availing himself of the 55th section, might have deprived himself of the power of getting the judgment transferred into a County Court under the 57th section; but the plain intent of the 57th section appears to me to have been that the execution

therein referred to, as required to be certified in order to have the Division Court judgment made a County Court judgment, was an execution issued by the Clerk of the Court wherein judgment was obtained.

In 1853 the Act 16 Vic., ch. 177, was passed, "to amend the Division Court Act of 1850, and to extend the jurisdiction of the said Courts."

By the 10th section of that Act it was enacted, "That it shall be lawful for the Governor of this Province, to appoint and authorize five of the Judges of the County Courts in Upper Canada, to frame such general rules as to them shall seem expedient, for and concerning the practice and proceedings of the Courts holden under the authority of the said Upper Canada Division Courts Act of 1850, and for the execution of the process of such Courts, and in relation to any of the provisions of the said Act, or of this Act, or of any Act to be hereafter passed, * * * And also to frame *forms* for every proceeding for which they shall think it necessary that a form should be provided; and all such rules, orders *and forms* as aforesaid, shall be certified to the Chief Justice of Upper Canada, under the hands of the County Judges so appointed and authorized, or of any three of them, and shall be submitted by the said Chief Justice to the Judges of the Superior Courts of Common Law at Toronto, or to any four of them, and such Judges of the Superior Courts (of whom the said Chief Justice or the Chief Justice of the Court of Common Pleas, at Toronto, shall be one), may approve or disallow, or alter or amend such rules or orders, and such of the rules as shall be so approved by such Judges of the Superior Courts, *shall have the same force and effect as if the same had been made and included in this Act.*"

By virtue of the authority contained in this Act the County Court Judges made, and the Superior Court Judges in 1854 approved, certain rules, orders, and forms, to regulate the practice in the Division Courts, and among these forms so approved was a form prescribed for the transcript of a judgment to a County Court, as follows :—

In the..... Division Court for the County of.....
Between C. D., Defendant, and A. B., Plaintiff,

The following proceedings were had :

On the day of, a summons, requiring the defendant to answer the plaintiff's claim, for a debt, (or for damages), amounting to, was issued out of this Court in this cause, according to the statute in that behalf: on the day of, the said defendant was duly served with a copy of the said summons, and of the particulars of the plaintiff's claim : at the sittings of the said Court holden on the day of, at....., the said cause came on to be tried, and the following judgment was then and there rendered by the Court (*here copy the minute of judgment from the Procedure Book*) : on the day of, a writ of execution upon the said judgment was duly issued out of the said Court by the Clerk thereof, which said writ of execution was directed to, a Bailiff of the said Court, and commanded him to levy the sum of of the goods and chattels of the defendant : on the day of , the said Bailiff returned the said writ of execution, with a return thereto in the following words: (*Copy Bailiff's return.*)

Now, when this form was prescribed, it is apparent that the Judges contemplated that the execution to be certified under the 57th section of the Act of 1850, as having been issued and returned in order to make a Division Court judgment a judgment of the County Court, was an execution issued out of the Division Court in which the judgment was obtained, notwithstanding anything contained in the 55th section of the Act; and this form, when approved, being declared to have a statutory effect, it is the same as if the 57th section had in its terms prescribed this identical form as the form of the transcript which, upon being filed in the office of a County Court as prescribed in the section, should become a judgment of such County Court.

Then comes the Act of 1855, 18 Vic., ch. 125, the 3rd section of which seems intended to extend the ancillary provision which was contained in the 55th section of the Act of 1850.

This section provides that, "It shall be the duty of the Clerk of any Division Court in Upper Canada, upon the application of the plaintiff or defendant, or one of them when there are more than one, having an unsatisfied judgment in his favor in such Court, or his agent, to prepare a transcript of the entry of such judgment in such Court, and to send the same to the Clerk of any other Division Court, in any other county in Upper Canada, with a certificate at the foot thereof signed by such Clerk and attested by the seal of the said Court, stating the amount unpaid upon such judgment, and the date at which the same was recovered, which certificate shall be addressed to the Clerk of the Division Court to whom it is intended to be delivered; and it shall be his duty, upon the receipt of such transcript and certificate, to enter the transcript in a book to be kept in his office for such purpose, and the amount due on such judgment according to such certificate; and all other proceedings shall and may be had and taken for the enforcing and collecting such judgment in such Division Court by the officers thereof, that can be had or taken, under the Upper Canada Division Courts Acts, upon judgments recovered in any Division Court, for the like purpose."

This Act makes no provision whatever for the Clerk of a Division Court to whom such transcript is sent, making any return of the proceedings taken thereunder in his Court to the Clerk of the Division Court where the judgment was obtained, so as to enable the latter to certify under his hand and the seal of his Court to the fact of the proceedings which have taken place; nor was there any rule or form adopted by the Judges for giving effect to this Act, until 1870, when new rules were framed and adopted, under and in pursuance of the provisions of the Act of 1869, 32 Vic., ch. 23, O.

In 1861, when the transcript in this case was given, the law governing the point was, as it appears to me, identically the same as it was as affected by the rules, orders, and forms adopted in 1854; and the case must be determined now as it should have been if the question had

arisen in 1855, after the passing of the 18 Vic., ch. 125, under the effect of those rules, orders, and forms, unless the Consolidated Statutes make any difference.

It is important, therefore, to consider the statute consolidating the Division Courts Acts.

This Act, 22 Vic., Consol. Stat., ch. 19, in its 2nd section, enacts, among other things, that "All rules and orders made under the provisions of any former Division Court Act, and in force when this Act takes effect, shall continue in force, subject to the provisions of this Act."

And in its 70th section, that "All rules and forms legally made and approved under the former 'Upper Canada Division Courts Acts,' and in force when this Act takes effect, shall, as far as applicable, remain in force until otherwise ordered."

The 137th section repeats, for consolidation, the 55th section of 13-14 Vic., ch. 53. The 139th section consolidates the 3rd section of 18 Vic., ch. 125, and the 142nd, 143rd, and 144th consolidate the 57th section of 13-14 Vic., ch. 53, without its preamble, which is omitted.

There is nothing in the consolidating Act which indicates any intention of making any variation in the law as to the transcript to be certified, for the purpose of having a judgment in a Division Court made a judgment in a County Court, nor anything to indicate that it was the intention of the Legislature that the Clerk of one Division Court should certify under his hand and the seal of his Court proceedings taken in another Court, under the 139th section, nor indeed is there any mode supplied whereby the Clerk of a Division Court in which the judgment was obtained, should have any means of knowing what was done under an execution issued in another Division Court, upon a transcript of the judgment sent thereto.

It can hardly be intended that the Clerk of one Division Court should certify that which the Legislature had provided no means of his having any knowledge of. It seems reasonable to hold that what he was to certify under his hand and the seal of his Court was what he must have know-

ledge of in virtue of his office. Indeed, it seems to me that the 142nd section of the consolidating Act must be construed as if the form prescribed by the Judges in 1854, which was the form then in force, was repeated in the 142nd section, and prescribed by the Legislature, leaving the law in that respect precisely the same as it was before and at the time of the passing of the consolidating Act.

No statutory form for a transcript of a judgment from one Division Court to another was provided until the adoption of the rules in 1870, framed under the Act of 1869; and when this statutory form is prescribed, it provides for the certificate by the Clerk of the Court in which the judgment was obtained *of the fact of an execution having been issued in his own Court and returned*; as if the Judges who framed and who adopted the form, and thereby gave it its statutory effect, contemplated that the transcript was not to be sent, even to another Division Court, until an effort to obtain satisfaction of the judgment by an execution issued out of the Court in which the judgment had been obtained had been made, thus treating the transcript as a remedy ancillary only to the remedy by process in the Court where judgment was obtained, when that process had proved inefficient.

However this may be, I am of opinion that the express provisions of the statute, authorizing a judgment of the Division Court to be made a judgment of a County Court, requires that an execution should be certified by the Clerk of the Division Court in which the judgment was obtained, as having issued out of his Court and having been returned, for the purpose of shewing that this most natural mode of obtaining satisfaction of the judgment had been tried and had failed.

The transcript in this case being wanting in that particular, we must hold, upon the authority of the decided cases, that no judgment to warrant an execution against lands has been obtained in the County Court of the County of Peterborough, and consequently that the sheriff's sale was void, and that the plaintiff has not been divested of

his estate in the lands in question, and that he should have judgment in his favor.

HAGARTY, C. J.—I do not dissent from the judgment, but concur with a good deal of hesitation.

Rule discharged.

BENNETT V. TREGENT.

False representation—Warranty—Evidence.

The plaintiff purchased a steam vessel from defendant on the faith, as he alleged, but which defendant denied, of certain representations made by defendant as to her power and capability; and, after some discussion, a document called a bill of sale, but not under seal, the vessel being unregistered, was executed. This merely stated that the defendant, in consideration of \$3,000, sold and assigned the vessel to plaintiff, with a warranty only as to title. The boat did not answer the alleged representations as to power and capability, but no fraud was charged against defendant. The plaintiff having brought an action for a false representation, and also for breach of warranty:

Held, that the plaintiff could not recover as for a false representation, there being no imputation of fraud; that his remedy, if at all, must be for breach of warranty, and that although the document contained only a warranty as to title, still it was a question for the jury upon the whole evidence whether the defendant had in fact intended to warrant her power and capability, or whether the document contained the whole contract.

THE first count of the declaration was in assumpsit, on the sale of a vessel by the defendant to the plaintiff, and alleged that the defendant promised that she had a three foot screw, which turned very fast, would turn a four foot wheel; that she drew four feet of water, ran — miles an hour, and was capable of making twelve miles an hour, and that from her power and speed she was suitable to be used as a tug; and the plaintiff bought her and paid the defendant \$3,000 for her—negating all that was promised, &c.

The second count alleged that the defendant by fraudulently representing that the vessel was, &c., (as set out in first count), induced the plaintiff to buy and pay for her, negating the truth of the representations, &c.

Pleas: 1. To the first count—Non-assumpsit. 2. To

second count—Not guilty. 3. To second count—A kind of special not guilty, and that the defendant warranted only the title.

Issue.

The case was tried before Galt, J., and a jury, at Simcoe, at the Fall Assizes of 1874. .

It appeared that the plaintiff purchased a steam yacht from the defendant, as he alleged on certain representations as to her power and capability, as set out on the record.

After some discussion and correspondence, a document, not under seal, was executed, which they called a bill of sale, (the vessel was unregistered,) which merely stated that the defendant, "in consideration of \$3,000, sells and assigns" the vessel to the plaintiff, with the words, "and I do hereby agree to warrant and defend her against all lawful claims and demands."

The defendant insisted that this was all he agreed to do, and that he expressly declined and refused to warrant anything but the title to the boat.

The plaintiff, on the other hand, swore most positively that the defendant warranted her, as set out, and represented to him that she possessed these qualities; and that on the faith thereof he made the purchase.

Evidence was given that the boat did not answer these alleged representations.

For the defendant it was objected that the first count failed being on an express warranty, that there was no contract till the bill of sale was delivered, and no warranty except of title; and that on the second count the plaintiff's remedy was to have returned the vessel and repudiated the contract.

The learned Judge overruled the objection to the second count, but reserved leave to the defendant to move; and he directed a verdict for the defendant on the first count, considering the bill of sale to be the concluded bargain.

He left the case to the jury on the second count, with a direction as to the law of false representation, which was

objected to on the ground that, even if defects were visible, if there were a false representation and the plaintiff relying on it made a purchase, that would be sufficient to entitle the plaintiff to recover, if he did not actually see the defect.

The jury found for the defendant on the first count, and for the plaintiff on the second count, with \$2,000 damages.

In Michaelmas term, *P. McGregor* obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial on the law and evidence.

In Hilary Term, *M. C. Cameron*, Q.C., shewed cause. The rule for a nonsuit can only be made absolute on the Court holding that there was no evidence at all for the jury. There was, however, such evidence. The defendant made a false representation, not knowing whether it was true or false, and intending the plaintiff to act upon it, and he did so act, and was misled. The defendant is therefore liable, and the case was properly submitted to the jury: *Dobell v. Stevens*, 3 B. & C. 623; *Canham v. Barry*, 15 C. B. 597; *Shepherd v. Kain*, 5 B. & Al. 240. As to a new trial, there is nothing upon which it can be granted, as it is not objected that the damages are excessive.

P. McGregor, contra. In order to recover on a fraudulent representation, the plaintiff should have shewn that he had rescinded the contract, and returned the vessel, or offered to do so: *Add. on Contracts*, 7th ed., 24-34; *Ferguson v. Carrington*, 9 B. & C. 59; *Selway v. Fogg*, 5 M. & W. 83; *Baily v. Merrell*, 3 Buls. 94. There was no false representation here; the plaintiff knew that the vessel was used for pleasure purposes, and not for tugging; and the son told him what he thought about the vessel, but that he knew nothing about vessels, and would only warrant the title. In order to recover for a false representation, it must not only be false in fact, but must be made fraudulently, that is, with the knowledge that it is untrue, and with the intention that the defendant should act upon it and so relying upon it be misled: *Benjamin on Sales*,

2nd ed., 338; *Attwood v. Small*, 6 C. & F. 232; *Clapham v. Shillito*, 7 Beav. 146; *Add. on Contracts*, 7th ed., 498; *Add. on Torts*, 4th ed., 834. Moreover, as the contract is in writing, and contains only a warranty as to title, parol evidence cannot be given of any other warranty. The plaintiff, therefore, should have been nonsuited, as there was clearly no evidence for the jury. At all events, there should be a new trial, and the point should be expressly left to the jury as to whether there was a warranty, as contended for, or not.

HAGARTY, C. J.—I think on this evidence a verdict on the second count, as for a knowingly false representation, cannot be supported. There seems no ground for imputing bad faith to the defendant.

As is said by Cockburn, C. J., in *Childers v. Wooller*, 2 E. & E. 287, at page 306: "The first count, which is simply for a false representation, is at once disposed of by the case of *Collins v. Evans*, 5 Q. B. 820, in error, and the numerous other authorities which establish that, to support an action for false representation, the representation must not only have been false in fact, but must also have been made fraudulently."

In *Collen v. Wright*, 7 E. & B. 301; in error, 8 E. & B. 647, Pollock, C. B., says, at page 652: "It will probably not be disputed that a representation is not actionable unless dishonestly made, or unless it be a warranty."

The authorities were somewhat considered in *Johnston v. Barker*, in this Court, 20 C. P. 228.

If the plaintiff can recover, I think it can only be as on a warranty. It is, I think, a question for the jury, whether the document, called a bill of sale, in which the defendant warrants his title to the vessel, really contains the contract; whether, after discussion and proposal, and counter proposal, the real bargain resulted in and is contained in that document. If so, of course the plaintiff must fail. But it does not necessarily follow that because there was a writing executed to pass the property, which is silent as to

any warranty, such as is here contended for, therefore no proof of warranty can be received.

The strongest argument for the defendant would be that as the instrument does contain a contract as to title, therefore nothing else was intended—" *expressum facit cessare tacitum*."

The point is mentioned, but not expressly decided, in *Stucley v. Baily*, 1 H. & C. 405, and Martin, B., suggests, in agreeing that there must be a new trial on other grounds, that the point would be proper for the consideration of a Court of Error. That, however, was a case in which a deed was executed.

The plaintiff here may urge that the bargain was made and completely settled at Windsor. Afterwards the defendant sent to him by post the alleged memorandum of sale of the yacht, and the promissory note for signature, which had been agreed upon.

The law is well discussed in the note to the leading case, *Chandelor v. Lopus*, Sm. L. C., 4th ed., vol. i., page 167: "It is sometimes far from easy to decide, whether a particular assertion was, or was not, intended for a warranty; and if it turn out to have been meant merely for a representation, the plaintiff suing on it must aver a *scienter* in his declaration, and must not treat it as a warranty, but will be defeated * * unless it turn out to have been false within the knowledge of the party making it. And at page 175, it is said, "the warranty being merely a collateral undertaking in consideration of the contract of sale, a breach of it affords no ground for rescinding the contract."

In *Chanter v. Hopkins*, 4 M. & W. 399, Lord Abinger says, at page 404: "A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet, collateral to the express object of it."

This, Martin, B., in *Stucley v. Baily*, 1 H. & C. 405, says is the best definition of a warranty.

Treating it as a case of warranty, Mr. McGregor's objection, that the plaintiff should have returned the vessel and avoided the contract, cannot prevail.

The parties contradict each other emphatically as to the presence or absence of a warranty.

The case already cited of *Stucley v. Baily*, shews how the whole must be left to the jury. In the language of Bramwell, B., at page 420 : "It is clear to demonstration that where the alleged warranty is not found in a document which is the contract between the parties, but depends upon the construction of a series of letters and extrinsic circumstances, inquiry must be made into all the surrounding facts, what the parties said and what they did, the facts anterior to the contract, contemporaneous with the contract, and posterior to the contract. Therefore, it must be submitted to a jury to say, whether, upon the whole evidence, they find that there was a warranty."

We must not assume in this case that there is any "document, which is the contract between the parties."

It was unnecessary for the purpose of passing the property, and was sent up signed by defendant, after the whole terms had been finally settled.

There must be a new trial, but I say nothing as to costs.

GWYNNE, J.—I concur that there should be a new trial upon the ground that I do not think there was evidence to sustain the verdict upon the second count; and that the jury must pass upon the question, whether or not there was a warranty, in view of all the surrounding circumstances, as laid down in *Stucley v. Baily*, 1 H. & C. 405.

The question to be determined is, what value is to be attached to the bill of sale upon which the defendant relies, as evidencing the contract, Was it the intention of the parties that it should be prepared as *the expression* of the contract, or is it a document having existence wholly independently of the contract? If it is, then what the contract was must be determined, and whether or not both parties mutually intended that the representations upon which the plaintiff relies should form part of the contract of sale.

Many things may have been said and written which

were not intended to form part of the contract, and the real question here is, what *did* both parties intend and understand to be the terms of the contract?

When the jury shall find as a fact whether or not the intention was, that the bill of sale, produced, should be *the expression* of the contract, the Court will be in a position to put a construction upon that document, but not until then.

GALT, J., concurred.

Rule absolute for new trial.

COATE V. TERRY.

*Sale of goods at auction—Entry by clerk—Memorandum in writing—
Statute of Frauds.*

An auctioneer may maintain an action in his own name for goods sold by him at auction; and an entry by his clerk, who attended the sale, in the sales-book, is a sufficient memorandum of the contract within the Statute of Frauds.

In this case the sales-book consisted of a file of sales-books, or sheets, fastened in a book, on the inside of which the conditions of sale were written, and at the end of the conditions it was stated that the terms of payment would be found at the head of each sale. At the head of the sheet in this case was the following: "Sale of groceries, wines," &c., "at the Mart, on Tuesday, the 19th December, 1873." The terms of payment were then given, and the entry of the sale was as follows: "Morrison—3 cases Booth & Co's gin, Terry, \$5.35 - - - \$15.75; and the evidence shewed that the name Morrison was that of the seller, and Terry of the purchaser.

Held, that the conditions of sale sufficiently referred to the sales-book or sheet, and that the evidence sufficiently shewed who was the seller and who the purchaser, so as to satisfy the statute.

THIS was an action brought by the plaintiff, an auctioneer, to recover damages on a re-sale of goods purchased by the defendant at the auction rooms of the plaintiff.

The cause was tried before Burton, J., and a jury, at Toronto, at the Fall Assizes of 1874.

At the trial it appeared that the names of the bidders were written down by a clerk of the plaintiff; and the learned Judge nonsuited the plaintiff, on the ground that as the auctioneer was suing in his own name, the signature

either of himself or his clerk was insufficient to satisfy the Statute of Frauds. The facts are more fully stated in the judgment.

In Michaelmas term *G. D'Arcy Boulton* obtained a rule *nisi* to set aside the nonsuit, and for a new trial, on the ground of misdirection of the learned Judge in holding that the signature of the auctioneer's clerk was insufficient to satisfy the Statute of Frauds.

In Hilary term *M. C. Cameron*, Q. C., shewed cause. The plaintiff, the auctioneer, cannot sue on the contract, as his name is not signed to it, but that of the owner; and it is not even written by the plaintiff, but by his clerk, by whom the sale was made. The defendant, however, can support the nonsuit on any ground, and there was no sufficient contract within the Statute of Frauds, as the sales-book was not annexed to and did not in any way refer to the conditions of sale: *Kaitling v. Parkin*, 23 C. P. 569; *Vandenbergh v. Spooner*, L. R. 1 Ex. 316.

Harrison, Q. C., contra. The case of *Bird v. Boulter*, 4 B. & Ad. 443, clearly shews that the auctioneer may maintain an action in his own name, and that an entry in the sales-book of the purchaser's name by the auctioneer's clerk is a sufficient memorandum within the statute. See also *Clarkson v. Noble*, 2 U. C. R. 361; *Reuss v. Picksley*, L. R. 1 Ex. 342; *MacLean v. Dunn*, 4 Bing. 722; *Benjamin on Sales*, 2d ed., 203. As to the sales-book not referring to the conditions, the evidence shews that the book produced at the trial consisted of a number of sales-books or sheets fastened in a cover, on the inside of which the conditions of sale were printed, and express reference was made to the sheets. The conditions and sheets, therefore, so referred to one another as to constitute a sufficient memorandum within the statute: *Newell v. Radford*, L. R. 3 C. P. 52. Moreover, the sale was for a number of different articles under the value of \$40, and each sale was a separate sale, and being under \$40 it did not come within the statute, and therefore, in no event, could there be a nonsuit.

GALT, J., delivered the judgment of the Court.

The case of *Bird v. Boulter*, 4 B. & Ad. 433, is an express authority, that, upon a sale by auction, the auctioneer may maintain an action in his own name, and that an entry in the sales-book, by the auctioneer's clerk, who attended the sale, of the name of the purchaser, is a memorandum in writing by an agent lawfully authorized within sec. 17 of the Statute of Frauds.

The nonsuit, therefore, on the ground on which it was based, cannot be supported.

Mr. M. C. Cameron, however, contended that he was entitled to support it on any ground that shewed the action was not maintainable, and argued that from the evidence it was plain that no sufficient memorandum of the sale existed, as the sales-book did not refer to the conditions of sale.

This argument is based on a misapprehension on the part of the learned counsel. The book produced at the trial was rather a file of sales-books than a sales-book. It was stated on the argument by Mr. Harrison, and not denied, that the sheets in which the memoranda of the sales were entered were, at the time of the sale, fastened in a book, on the inside of which the terms of sale were written; which conditions of sale were:

"The highest bidder to be the purchaser. In case of dispute between two or more bidders, the lot in dispute to be put up again. The articles to be taken away at the expense of the purchaser, and settled for before delivery, or they will be resold; and any deficiency arising on the resale, together with all charges attending the same, must be made good by the first purchaser.

"Terms of payment at head of each sale."

At the head of the sheets forming the sales-book, in the present case, was the following:

"Sale of groceries, wines, etc., at the Mart on Friday 19th December, 1873.

"Terms, under \$100, cash; \$100 to \$200, three months; over \$200, four months, on approved notes."

The sale was shewn to have been what is called a Trade Sale, and the goods sold belonged to several different parties.

The entries were made in the following form—The name on the left hand was that of the vendor :—

Morrison—3 cases, Booth & Co.'s gin, Terry, \$5.25 ... \$15.75

All the entries are of the same description.

The case of *Newell v. Radford*, L. R. 3 C. P. 52, establishes that parol evidence is admissible, in a case like the present, to prove what the parties would have understood to be the meaning of the words used in the memorandum.

That was a case in which the memorandum was very much more ambiguous than in the present. The entry was made by an agent of the defendant in a book of the plaintiff, as follows : “ Mr. N., 32 sacks culasses at 39s., 280 lbs., to wait orders. J. W.” Held that the above entry was a sufficient memorandum in writing of the contract to satisfy the Statute of Frauds ; for that the parol evidence of the relative trades of the parties was admissible, independently of the correspondence, and shewed that the defendant was the seller of the flour, and the plaintiff was the buyer.

The evidence in this case shewed clearly who was the seller, and who was the purchaser.

Rule absolute.

THE QUEEN V. DAVIS.

Road constructed by Joint Stock Company—Right of municipality to remove obstructions upon—12 Vic. ch. 84, sec. 22—Construction of.

Held, that the special rights and privileges conferred on the St. Catharines, Thorold, and Suspension Bridge Road Company, who had constructed their road over what had previously been a highway, under 12 Vic. ch. 84, sec. 22, did not take away the general powers possessed by the municipalities through which it passed, as to the removal of obstructions. Where, therefore, the defendant was convicted by the police magistrate of the town of Clifton for unlawfully encumbering a street in the said town, being a portion of the road in question, by placing and leaving thereon a cart used by him for taking likenesses, contrary to a by-law of the said town, the Court sustained the conviction.

IN Trinity term *Bethune* obtained a rule *nisi* to quash a conviction made by the Police Magistrate of the town of Clifton, which conviction was: "For that he, the said Edward Davis, did, on the 27th day of June, 1874, at the town of Clifton, unlawfully encumber the highway, street, or square near the Clifton House, in the said town, by placing and leaving thereon a cart used by him, the said Davis, in taking likenesses, contrary to a certain by-law of the municipality of the Town of Clifton, passed on the 16th day of August, 1865," &c.

The objections taken were: 1. That the place upon which the said cart stood was not a public highway, and the said Justice had no jurisdiction to make the said conviction. 2. That, at all events, upon the evidence, the defendant acted upon the *bonâ fide* belief that the place upon which the said cart stood was not a highway, and the said magistrate had no jurisdiction, in such a case, to try the question of title. 3. That the place, at all events, in which the said alleged offence was committed, was upon a road made by the St. Catharines, Thorold, and Suspension Bridge Road Company, incorporated under the statute 12 Vic., ch. 84; and that the said by-law was not operative so as to create any offence committed upon the said road, an offence of the kind being specially provided for by legislative enactment.

In this term *McKenzie*, Q. C., shewed cause. The Act 37 Vic., ch. 18, sec. 5 & 6, O., would shew that this applica-

tion will not lie, but that there should have been an appeal to the Judge of the County Court: *Paley* on Convictions, 4th ed., 413-5. As to the two first objections, the case of *Williams v. Adams*, 2 B. & S. 312, clearly shews that they are untenable. As to the third objection, there is nothing in the Joint Stock Companies Act taking away the jurisdiction of the municipality to remove obstructions, and particularly in this case, where the road was a public highway before it came into the possession of the company. The joint stock company have power to collect tolls, and to keep the road in repair, but the municipality have the general supervision of the road. The case of *St. Catharines, &c., Road Co. v. Gardner*, 20 C. P. 107, 21 C. P. 195, only shews that the company were bound to keep the road in repair.

Bethune, contra. It must be admitted that the case of *Williams v. Adams*, 2 B. & S. 312, answers the first two objections. As to the third objection, the by-law is passed by the municipality of the Town of Clifton under the provisions of the Municipal Act, 12 Vic., ch. 81, secs. 2 and 61. But by 12 Vic., ch. 84, authority is given to joint stock companies to construct roads, which when constructed are to be vested in the company, and express jurisdiction is given to the company in cases of obstruction; and it was under this Act that the St. Catharines, &c., Road Company was incorporated. The Legislature, therefore, having expressly given the company authority in cases of this kind, it did not intend to reserve such power to the municipality. The cases of *St. Catharines, &c., Road Co. v. Gardner*, 20 C. P. 107, S. C. in appeal, 21 C. P. 195; *Regina v. Brown*, 13 C. P. 356, shew that these roads are not within the Municipal Act.

GALT, J.—The case of *Williams v. Adams*, 2 B. & S. 312, as was candidly admitted by the learned counsel for the applicant, is conclusive as to the first and second objections.

The third remains to be considered.

The by-law under which the conviction took place is not before us, but appears from the evidence to have been produced and admitted before the Police Magistrate; and as no objection was taken as to the conviction not being in accordance with it, we assume that it was regular, and would support the conviction, provided the case comes within the powers conferred upon the municipality, and that the fact that the road was a joint stock road does not exempt it from the jurisdiction of the municipality.

It was conceded that this road was a public highway before the joint stock company took it into their hands. This road company was originally incorporated under 12 Vic., ch. 84, which statute was repealed by 16 Vic. ch. 190, which latter Act is embraced within the provisions of Consol. Stat. U. C., ch. 49, and this road was constructed by them.

The powers conferred on these incorporated companies, as respects taking possession of highways, appear to be the same in these several enactments, and are, so far as is necessary for the decision of the present case, as follows: Consol. Stat. U. C., ch. 49, sec. 3: "Any number of persons not less than five may form themselves into a company for the purpose of constructing and may construct in, along, or over, any public road or highway, or allowance for road, or on, along, or over any other land, a plank, macadamized or gravelled road." There are certain conditions prescribed, but they have no bearing on this case.

By sec. 60, of ch. 49, "Every road or other work connected therewith, and all materials from time to time provided for constructing, maintaining, widening, extending or repairing the same, and all toll-houses, gates, and other buildings, constructed and acquired by or at the expense of any company acting under this Act, and used for their benefit and convenience, shall be vested in the company, and their successors."

There are numerous provisions made for the protection of the property of the company, and to prevent injury or obstruction thereto, among which is the following:

Sec. 104, sub-sec. 5, "In case any person leaves any waggon, cart, or other carriage upon such road without some proper person in the custody or care thereof, longer than may be necessary to load and unload the same, except in case of accident, and in cases of accident for any longer time than may be necessary to remove the same." Sub-sec. 13. "Every such person shall, upon conviction thereof in a summary way, before any Justice of the Peace in or near the place where the injury has been done, be sentenced to pay all damages sustained by such company, which damages shall be ascertained by the Justice on hearing the complaint; and also be sentenced to pay a fine of not more ten dollars, nor less than one dollar."

By sec. 109, "Each fine and forfeiture collected under this Act shall, unless otherwise provided, be paid to the treasurer of the company or municipality owning the road or other work in respect of which such fine and forfeiture have been imposed. for the use of such company or municipality."

For the purposes of this argument we must assume, on behalf of the applicant, that this road was constructed *prior* to the 19th June, 1865, on which day the Act to incorporate the Town of Clifton was passed, otherwise the provisions of the by-law would unquestionably apply. If this be so, then, at the time when the road was constructed, the *locus in quo* formed part of the township of Stamford; and the rights and powers of township municipalities, as regards roads, were defined by the 12 Vic. ch. 81, sec. 31, sub-sec. 10, as the 13 & 14 Vic. ch. 15, did not extend to townships. That Act did not vest the public highways and roads in the township municipality; but by sub-sec. 16 authorized them to pass by-laws for opening, constructing, &c., "any new or existing highway, road, street," &c., (the soil remaining vested in the Crown). And, by sub-sec. 17, to regulate the manner of granting to associated joint stock road companies permission to proceed with any road within the jurisdiction of such municipality.

There is no provision empowering them to pass by-laws

for preventing the encumbering, injuring, or fouling of any highway ; so that when the road was constructed the municipality of the township of Stamford had no authority to pass any by-law similar to the present. The road was constructed over a highway under and by the permission of the municipality, and no special legislation applied to it ; but the rights of the road company were protected by the provisions already quoted. The municipality had no right of property vested in them, and of course could grant none. All they could do was to grant permission to a joint stock road company to proceed with any road within their jurisdiction, the right of the public to use the said highway remaining as it was before, subject to the privileges granted to the company.

In 1850 the 13 & 14 Vic., ch. 15, was passed, which vested the right to use as public highways all roads, streets, and public highways within the limits of any city or incorporated town, in the municipal corporation of such city or incorporated town ; and while this Act was in force the Act incorporating the town of Clifton was passed, which, by sec. 1, enacted, that the said town of Clifton should be a body corporate, apart from the township of Stamford, with such powers as are now by law conferred upon incorporated towns in Upper Canada.

These included all the powers conferred on incorporated villages, and under these the by-law in question was passed.

It appears to me, therefore, that Mr. Bethune's third ground of objection fails, for the reason that when the road was built the provisions of the Joint Stock Company's Act applied only for the protection of the interests of the company, leaving the interests of the public to be dealt with according to the law respecting highways ; and that by subsequent legislation the power to deal with those interests was, in this case, conferred on the Municipality of Clifton, who, in accordance with those powers, passed this by-law.

HAGARTY, C. J.—I agree in the result of my brother Galt's judgment, on this ground :—

We are not informed when this road company was incorporated, nor to what extent and time they obtained the right to use what it is admitted was a public highway before any right accrued to them.

When the by-law was passed the Town of Clifton had the power to pass it, as already pointed out.

The only point remaining is, whether the provisions of the Joint Stock Companies Act supersede or prevent the operation of the general law.

I think not. The municipality, on behalf of the general public, may, I can easily conceive, have much wider interests to protect than the road company.

I can understand a road company arranging with the municipality to obtain a partial right over a road or street, *e. g.*, to make a plank or other roadway over a given space in width, on the highway.

Section 3 of Consol. Stat. U. C., ch. 49, speaks of constructing "in, along, or over, any public road or highway, or allowances for road," &c., "a plank, macadamized or gravelled road, not less than two miles in length," &c.

The case of *Regina v. United Kingdom Electric Telegraph Co.*, 9 Cox C. C. 137, before Martin, B., and again in Term, *Ib.*, page 174; and *Regina v. Train*, 2 B. & S. 640, may be referred to on the law as to using parts of highways, and the general rights of the public, as to *all* the space of the road as laid out or as used between the ordinary fences or bounds thereof.

GWYNNE, J.—I think there can be no doubt that the by-law referred to in this matter, as having been passed by the Municipality of the Town of Clifton, under the provisions of 12 Vic. ch. 81, sec. 60, sub-sec. 2, and sec. 61, affected the highway or road, within the municipality, upon which the St. Catharines, Thorold, and Suspension Bridge Road Company's road has been constructed, and

in question in this matter, notwithstanding that the company's road may have been constructed before the passing of the by-law under 12 Vic., ch. 84, and notwithstanding anything contained in the 22nd section of the latter Act, and whether the encumbrance, injury, or fouling, to be affected by the by-law, was caused by the road company themselves or any other person.

The privileges given to the road company, under the 22nd section of 12 Vic., ch. 84, are for their own benefit, and the injuries there referred to are quite distinct from those which the municipality, in the interests of the corporators of the municipality, may forbid, and, if committed, punish.

Moreover, the road company itself may be guilty of the offence prohibited or contemplated to be affected by the by-law.

Rule discharged.

TAYLOR V. THE GRAND TRUNK RAILWAY COMPANY.

R. W. Co.—Liability as carriers—Evidence.

The plaintiff shipped a number of bundles of iron by defendants' railway from Montreal to London, subject to a condition that on its arrival, and on being detached from the train, the delivery was to be complete and the liability of the defendants to terminate. On the arrival of the iron the defendants forthwith sent the plaintiff advice notes of its arrival, on which were endorsed the above condition, and from which it would appear that all the iron had arrived; and requested him to send for it without delay, and that it thenceforth remained at his risk. The plaintiff, who was the ticket clerk at the London station, during all the time that the iron was there, saw the iron and could have counted the bundles and have seen that they were correct. Instead, however, of doing so and taking it away, he allowed it to remain in a place where, by an arrangement which had existed for some years between him and defendants, it was accustomed to be placed free of charge and for his sole convenience, and where he was enabled, from time to time, to send for and take such portions as he required.

Held, that under these circumstances the defendants were not bound to shew that all the iron shipped had in fact arrived: that therefore no liability would attach upon them for an alleged deficiency; and, at all events, that this point could not now be raised, as it was not taken at the trial.

DECLARATION. First count: that the defendants, as carriers of goods for hire, did not carry and deliver to the plaintiff a quantity of hoop iron, delivered to them at Montreal for carriage and delivery to the plaintiff at London.

Second count: that the defendants so negligently took care of the goods of the plaintiff, delivered to them for safe keeping as warehousemen, that the goods were lost.

Third count: trover.

Pleas. To the whole declaration: not guilty.

To the first count: 2. That the plaintiff did not deliver to the defendants, nor did they receive the goods in the first count mentioned, upon the terms and conditions in that count mentioned.

3. That the defendants did carry, and were ready and willing to deliver the goods in the first count mentioned to the plaintiff, at London, of which the plaintiff had notice; but that the plaintiff did not nor would accept, take, and remove the goods, whereupon the defendants unloaded the goods from their cars, and put them in the place where

they store such goods, and that while they were so held by the defendants in store, they were lost or stolen, without any default of the defendants.

4. That the goods were received by the defendants for carriage, subject to and upon the terms and conditions of a special contract, whereby, by the fifth condition, among other things, it was provided, that the delivery should be considered complete, and that the responsibility of the defendants should be considered to terminate, when placed in the company's shed or warehouse (if there should be convenience for receiving the same), at their final destination, or when they should have arrived at the place to be reached on the railway of the defendants, except lumber, coals, bricks, and goods of like bulk and description, the delivery of which should be complete and the responsibility terminated upon their being detached from the train whereby they had been drawn: that the warehousing of them should be at the owner's risk and expense. And the defendants averred that they did within a reasonable time carry the goods, in the first count mentioned, under such special contract, to London, and there, upon the arrival of the said goods, were ready and willing to deliver them to the plaintiff, of which the plaintiff had notice; and that any loss that happened to the said goods happened after their arrival at their destination, and after they had been detached from the train whereby they had been drawn, and while the plaintiff, for his own convenience, allowed the same to remain upon the defendants' premises.

5. That defendants did, within a reasonable time, safely carry and deliver the goods to the plaintiff at London.

There was another plea to the first count, and several pleas to the other counts, which it is not necessary to set out.

The cause was tried before Gwynne, J., without a jury, at London, at the Fall Assizes of 1874.

The plaintiff was called, and produced two receipts of the defendants, one dated the 12th of September, 1872, for 1760 bundles of hoop iron, the other dated the 15th of

September, 1872, for 1800 bundles of like iron, to be carried from Montreal to London for the plaintiff, subject to the terms and conditions endorsed on the receipts respectively. Upon the receipts were endorsed the conditions set out in the fourth plea.

The plaintiff also produced nine several advice notes, dated respectively, at London, the 17th, 19th, 21st, 23rd, 25th, and 27th of September, 1872, notifying the plaintiff of the arrival of the iron at London.

He said that, by comparing the quantities mentioned in these advice notes with the quantities mentioned in the receipts given by the company, all the iron appeared to have arrived. The plaintiff also said that he was an officer in the service of the defendants as ticket clerk at the London station, when the iron arrived, and saw the iron after its arrival.

Upon the back of the advice notes was printed the same conditions as were endorsed upon the receipts given by the defendants upon the iron being left with them for carriage, and the plaintiff said that, although notified of the arrival of the iron, he did not send for it, and, although frequently requested to remove it, he did not do so : that in pursuance of an arrangement which, as he said, had existed between him and the company for twelve years, the iron, upon arrival, was, with his knowledge and consent, taken off the trucks and placed upon the ground ; and that it was so placed for his sole convenience ; and that as he sold parcels he sent orders for the parcels sold to the defendants, who thereupon, in pursuance of such orders, delivered the iron to his vendees.

It was proved that the defendants made repeated applications to the plaintiff to remove the iron, which he did not do, but from time to time gave orders to purchasers for portions : that he removed one part to a warehouse, then recently acquired by him for the purpose ; but the other part he suffered to remain, where the iron had been placed on the defendants' premises, for his own convenience, into the winter, when it became covered with snow, and in part incapable of being got out during the winter.

In January, 1873, he gave an order for 547 bundles, which he claimed then to be the balance remaining, not hauled away; part of this could not be got out until the spring, when it appeared that there were only 309 bundles forthcoming to supply this order; thus making a deficiency, as the plaintiff swore, on his examination under the Administration of Justice Act, of 238 bundles.

The plaintiff admitted that he had since discovered that 72 bundles more had been delivered than he had given credit for on his previous examination; the error having arisen, as he said, in the negligence of his clerk in not making proper entries in his books in respect of the iron which he had drawn to his recently acquired warehouse.

As to the quantity delivered there, the plaintiff himself knew nothing. His only knowledge as to it was acquired from the entries made by his clerk in his books; and which, as above stated, he admitted he found to be incorrect to the extent of 72 bundles.

This was all the evidence.

At the close of the plaintiff's case, a nonsuit was moved for upon the ground that the first count was wholly displaced by the evidence; and that there was no evidence upon the other counts.

On behalf of the plaintiff, it was contended that under the terms of the fifth condition, endorsed upon the receipts and advice notes, the defendants were liable as warehousemen, being, as was contended, obliged under this condition to put the iron into a warehouse; and submitting to the objection, as to the plaintiff's inability to recover under the first count, leave was asked, which was granted, to amend the count.

The count was amended accordingly, and as amended averred the delivery of the goods to the defendants to be by them carried, subject to and under certain conditions endorsed upon a receipt given for the said goods by the defendants, and the promise of the defendants to carry upon and subject to such conditions: that all things happened, &c., to entitle the plaintiff to sue, &c.; and that

nothing had happened to deprive him of his right to sue; yet that the defendants did not carry and deliver the said goods to the plaintiff, whereby a great part of the said goods was lost; and the count closed with the following averment: "And the plaintiff avers that the non-delivery of the said goods arose from the negligence and omissions of the defendants and their servants, within the meaning of the Dominion Acts, passed in the 31st and 34th years of Her Majesty's reign, chaptered 68 and 43 respectively.

The learned Judge expressed his opinion that this amendment did not remove the objection; and it was then agreed that he should enter such a verdict as appeared to him proper, subject to the opinion of the Court upon the whole matter as a jury.

The learned Judge was of opinion that the plaintiff could not recover, and entered a nonsuit.

In Michaelmas term *Harrison*, Q. C., obtained a rule *nisi* to set aside the nonsuit and to enter a verdict for the plaintiff for \$394, the value of 166 bundles.

In the same term *McMichael*, Q. C., shewed cause. The verdict is perfectly right, and should not be disturbed. The evidence shewed that the iron was brought to the place of destination, and there detached from the train, and notice of its being there given to the plaintiff; and this is all that the defendants are required to do. There is no obligation upon them to warehouse it. The evidence, moreover, shews that the iron was placed where it was at the express request of the plaintiff, and solely for his use and convenience.

Harrison Q. C., and *Bartram* contra. The delivery of the proper amount to the defendants is proved, and it rests with them to shew that this amount was carried to London and there delivered to the plaintiff. The defendants should have checked the goods on their arrival at London, and have seen how much they were discharging, as they alone had the opportunity of doing so, and, therefore, as they did not do so, and there appears to be a deficiency, the presumption is, that the loss occurred during the

carriage. *Hall v. Grand Trunk R. W. Co.*, 34 U. C. R. 517, is expressly in point, and shews that the defendants are liable. However, under the special condition, even if the goods were safely carried to London, the defendants by not warehousing them are liable. By the conditions the goods, on arrival at their destination, must be placed in their warehouse, and, if they have none there, at some other warehouse. *Griffiths v. Lee*, 1 C. & P. 110, shews that where any loss occurs the onus is upon the defendants to shew that they have complied with conditions, and, as they have not done so here, they are liable.

GWYNNE, J., delivered the judgment of the Court.

Mr. Harrison's sole contention was, that evidence should have been given by the defendants to shew that *all* the iron did in fact arrive in London.

Upon no principle can the plaintiff, in our judgment, be now heard to raise the objection, not only because the point was not raised at *Nisi Prius*, but because of the whole course of dealing between the plaintiff and the defendants, in respect of the iron, as proved by the plaintiff himself.

At the trial the plaintiff's contention was, that in virtue of the terms endorsed upon the receipts produced, and upon the advice notes, the defendants were liable to him as warehousemen; and in order to assert this claim, the plaintiff himself was called to prove that the defendants had given him the nine several advice notes, produced by him in evidence, informing the plaintiff of the arrival of the iron in London; and he gave evidence that the quantities, so announced as having arrived in London, corresponded with the quantities acknowledged by the receipts to have been delivered to the defendants at Montreal.

The plaintiff thus, for his own purposes, established *as against* the defendants that *all* the iron had arrived in London, in the hope of making them liable for the whole as warehousemen.

When it was objected that after notice of the arrival of

the iron so proved the plaintiff could not recover under the first count, the defendants' liability as carriers being at an end, the plaintiff's counsel, instead of meeting that objection with the point now raised, submitted to the contention, and obtained leave to amend, and by his amended count, in order to deprive the defendants of the benefit of the terms and conditions upon which the iron was carried, averred that the loss, of which the plaintiff complained, was occasioned by the negligence and omissions of the defendants and their servants within the meaning of the statutes in that behalf.

Then as to the dealings of the plaintiff with respect to the iron. He admits having received nine several advice notes of the arrival of the iron in parcels at London, such nine advice notes comprehending the whole quantity delivered to the defendants to be carried. These several advice notes informed the plaintiff that he was required to send for the iron mentioned in them respectively, without delay, and that thenceforth the iron would be at his risk and expense. On the advice notes was also endorsed the fifth condition.

The plaintiff says that he saw the iron after its arrival, but he did not take it away. He was, during all the time that the iron was on the defendants' premises, ticket-clerk of the defendants at their London station. He had then, it may be said, daily opportunities of seeing the iron, and, if he had pleased, of counting the bundles, to see that they were correct. Although repeatedly requested to take away the iron, he did not do so; but the iron, with his knowledge and consent, and to suit his convenience wholly, was placed in a rather open and exposed place, certainly, but in a place in which, by an arrangement between the plaintiff and the defendants which had continued for many years, iron had always been placed for the plaintiff, free of all charge, and for his convenience. The plaintiff, from time to time, sends for and takes away parcels of this iron, and, as appears by his own evidence, in such a manner that, if the iron was there at the defendants' risk, mistakes, inju-

rious to them, might easily, and the plaintiff admits did in fact occur, with respect to the 72 bundles, which, at one time the plaintiff swore that he had not, but afterwards, discovered that he had, received.

Now, the defendants had no obligation imposed upon them *as carriers* to put the iron where they did, or to keep it on their premises for the plaintiff at all, either free of charge or otherwise, nor to deliver it in parcels as it might suit the plaintiff's convenience to call for it.

The proper construction, in our opinion, to put upon all these acts and dealings is, that the iron, immediately upon its being taken from off the cars and placed where it was placed for the plaintiff's convenience, was constructively, if not actually, delivered to the plaintiff, so as to relieve the defendants from all further liability *as carriers*. The plaintiff had then every reasonable opportunity of satisfying himself, and that was the time, when he was assuming all risk as to the iron, that he should have satisfied himself whether or not *all* the iron had arrived; and the presumption ought to be that he did then satisfy himself that it had.

In *Shepherd v. Bristol and Exeter R. W. Co.*, L. R. 3 Ex. 189, Martin, B., who was of opinion, contrary to the opinion of the majority of the Court, that in that case the liability of the defendants as carriers had not ceased, approves of, as founded upon reason, justice, and good sense, the rule laid down in *Redfield on Railways*, 4th ed., vol. iv., p. 67, on "The Termination of the Carriers' Responsibility," namely, "that the responsibility of the carrier, as such, does not terminate, until the owner or consignee, by watchfulness, *had, or might have had*, an opportunity to remove his property."

Applying this rule to the present case, there can be no doubt that the defendants' liability, as carriers, ceased when, after the delivery of the advice notes to the plaintiff, the iron, to suit his convenience, was piled where it was.

The particulars to which I have adverted distinguish this case from that of *Hall v. Grand Trunk R. W. Co.*, 34 U. C. R. 517.

Upon every principle of justice and common sense, it appears to us that the nonsuit recorded should not be interfered with.

The rule will therefore be discharged.

Rule discharged.

DANARD V. THE CORPORATION OF THE TOWNSHIP OF
CHATHAM.

Watercourses and streams—Clearing out—Liability of municipal corporations—C. S. U. C., ch. 54, sec. 277—Construction of.

In 1859 the defendants, assuming to act under the Municipal Act of 1858, C. S. U. C., ch. 54, sec. 277, passed a by-law requiring persons to clear out all obstructions in streams across their lots; and providing that the Council, in their discretion, might do the work and levy the cost thereof by special rate on the lands; and imposing penalties, &c. The defendants cleared a stream on and above the plaintiff's land, and assessed him as a non-resident for \$75, the amount expended on his lot, which he paid. They did not, however, clear the stream on the lot below, nor compel the occupant to do so, whereby in times of freshet increased quantities of water were brought down and dammed back on plaintiff's land, injuring his crops, instead of lying, as before, in the woods above and gradually evaporating and passing away, without doing him any injury. *Held*, that no action would lie against defendants, either for not clearing out the stream themselves, or for not compelling the owners to do so; and, therefore, that they were not liable to the plaintiff for the damage sustained by him.

APPEAL from the County Court of the County of Kent.

Declaration. First count: that the plaintiff was the owner of lot No. 9, through which a creek flowed; that the defendants levied from the plaintiff and other owners of land through which the creek flowed, certain rates and taxes to clear out and remove brushwood and other obstructions from the creek, whereby it became the defendants' duty to remove the timber, brushwood, and obstructions from the said creek, but neglecting their duty the defendants did not do so, but wrongfully permitted the same to remain, whereby the plaintiff lost the use of a portion of his land, and the waters which would have flowed down the creek were thereby obstructed and overflowed the plaintiff's land.

Second count : setting out the ownership and the levying of the tax, as in the first count ; and that the defendants caused the brushwood and obstructions to be removed from the creek across the lands adjoining and above the plaintiff's land, whereby the waters from above the plaintiff's land were brought down upon the plaintiff's land ; and alleging that the defendants neglecting their duty, did not remove the brushwood, timber, and obstructions from said creek through the plaintiff's land, and the lands below the plaintiff's land, and wrongfully permitted the said obstructions to remain therein, whereby the waters so brought into the plaintiff's land were obstructed and prevented from flowing down said creek, and the plaintiff's land was thereby overflowed, &c.

Pleas. 1. Not guilty. 2. Traversing the duty alleged. 3. It is unnecessary to set out this plea as it was abandoned by the defendants.

At the trial it appeared that the defendants passed a by-law in 1859, professing to be under the Municipal Act of 1858, requiring persons to clear out all obstructions to streams and watercourses across their lots ; and as to unoccupied lands, to enable the council to have the work done and levy the costs by special rate ; and imposing penalties, &c. The by-law also declared that the council might use their discretion in granting sufficient time to owners or occupants to clear out the streams, &c, provided the given time should not exceed two years ; half the channel to be cleared the first year, and the other half the last year.

It appeared that the plaintiff, as owner of lot No. 9, being non-resident, had been assessed at \$75, which he had paid in December, 1869. No. 10 was above him, and No. 8 below him on the stream. The defendants let out to certain persons the clearing of the stream across No. 9, for \$74, and paid for it. No. 8 was occupied, and they left that for the occupant to do, which he never did, although the defendants warned him to do so. The defendants also cleared out the stream on No. 10.

It was shewn that there was a beaver dam in the stream on No. 8, and the clearing of the creek above No. 9, brought more water down on No. 9; but if the stream had been cleared below No. 9, the water would have run off.

A witness swore that there would be no use in the plaintiff clearing out the creek on his lot, No. 9, if it was not cleared below.

The owner of No. 7, still lower down, said he had cleared the creek on that lot, pursuant to the by-law. So were lots Nos. 6 and 5, and other lots above the plaintiff and also below were cleared out.

The jury found, in answer to question put to them :

1. That the defendants did bring down water on No. 9, which they did not take off.

2. That the plaintiff did not contribute to his own damage by not keeping the creek clear.

3. That the work for which the \$75 was taken was done.

4. That the stream was not cleared by the resident on No. 8, according to the by-law.

And they found a verdict for the plaintiff for \$75, the amount of the assessment, and \$50 for damages sustained, in all, \$125.

In the following term the defendants obtained a rule *nisi* to enter a nonsuit, which after argument was discharged. The learned Judge in his judgment stated that owing to the clearing of the creek east, or above the plaintiff's farm, and not clearing it on the west, or below, the water was brought down in larger quantities in times of freshet, and dammed back on his crops, whereas before the work was undertaken the water lay in the woods in points above, and gradually evaporated or passed away, without doing him any injury. That the municipality by not pursuing the proper plans for clearing the whole length of the creek, and providing an outlet for the water so that no damage should occur to individuals, had rendered themselves liable for the loss sustained; and that the jury had acted intelligently in assessing the damages.

From this judgment the defendants appealed.

McMichael, Q.C., for the appeal. The corporation clearly cannot be held liable, and therefore there should have been a verdict for the defendants. The defendants can be put in no worse position than the owners themselves of the land, and it cannot be held that the owners would be wrongdoers for clearing up the river by removing fallen timber from it, and thereby causing the stream to flow in its natural channel, and preventing the water lying on the adjoining lands, for they have the right to cultivate all their lands, so long as they do not interfere with the natural flow of the stream, although damage may ensue to the lands below; and it is not even alleged here that the act was done negligently.

Robinson, Q.C., contra. The judgment of the learned Judge in the Court below is right. The corporation were not compelled to clear the stream, and no one could maintain an action against them for not doing so; but they voluntarily undertook the work, passed a by-law, and levied a rate for that purpose. Having done this, they were bound so to perform the work as not unnecessarily to injure the property of the plaintiff or others, and having commenced the work they should have carried it out. They were not at liberty to bring down the water in increased quantities and volume upon his land, and there leave it: *Rowe v. Corporation of Rochester*, 29 U. C. R. 590; *Farrell v. Mayor, &c., of London*, 12 U. C. R. 343; *Reeves v. Corporation of Toronto*, 21 U. C. R. 157; *Brown v. Municipal Council of Sarnia*, 11 U. C. R. 87. The declaration alleges that the defendants acted wrongfully, which is sufficient, as it is not necessary to allege that it was done negligently: *Brine v. Great Western R. W. Co.*, 2 B. & S. 402.

HAGARTY, C. J., delivered the judgment of the Court.

No question was raised as to the validity of the by-law, or as to the power of the corporation to assess as they did. We therefore do not discuss it; but assume, as the parties seem to have done, that it was legal.

It is not easy to see how an action lies on the first count. It amounts to this, that having levied a special assessment for clearing out the creek, and having omitted to do so, an action lies.

It is not shewn that any particular damage was suffered by the plaintiff from not clearing out the creek across his land, but that the omission was general; that, in short, after the council had levied the money for a special improvement, they did nothing. The whole claim is for a non-feazance.

It is not suggested that any statute requires them to do the work, or makes them responsible for omitting to do it, nor is it alleged that an unreasonable time has elapsed, &c.

I cannot see how the mere levying of the rate for the removal of a nuisance does by itself create a cause of action for injuries caused by the continuance of the unabated nuisance. There may in such cases be a remedy by mandamus, which we do not now decide; or, if a corporation expressly decline to do the work, for which the rate is expressly imposed, there may possibly be some remedy as to the money.

It is merely as to the general rights of the parties that it is necessary to notice the first count, as the evidence did not in any way support it.

The evidence on both sides was very clear that any injury done to the plaintiff's lot No. 9, was caused by the omission to clear out the stream across the lands below. A beaver dam on No. 8 was spoken of as causing an obstruction.

Then the case may be viewed in two aspects: 1. The clearing the stream above the plaintiff's lot brought down more water on it. 2. The non-clearing of the stream below, prevented the due escape of such waters.

There is no pretence for saying that the expenditure of the amount assessed in clearing the stream across the plaintiff's lot, did him any injury; nor is there any evidence, whatever, that any work done above the plaintiff's was done negligently or unskilfully.

It is difficult to separate the action of the municipality, from a like action taken by the respective owners of lands over which a natural stream flows.

We cannot hold, I think, that a proprietor of lands can be a wrongdoer in removing casual obstructions, such as fallen timber, drift wood, &c., from such a stream, simply allowing it to follow its natural channel, and not to lie in ponds or patches of water on his own low lying land adjoining its banks. He has the right to clear and cultivate all his own land; and so long as he does not alter or interfere with the natural flow of the stream, I do not see how he can be liable for the consequences of his merely removing the casual and accidental obstructions to that natural flow. I am looking at such removal as effected in the ordinary way, without negligence or want of due care. Then, if the removal of these obstructions, and the prevention of the casual overflow of the stream on the defendants' lands adjoining the banks, cause the water in time of freshet to run more quickly or in increased volume below the land, I do not understand how the owner of the land below can claim any right against the owner above to leave the drift wood, &c., in the stream, and to allow it to evaporate gradually in ponds, &c. Such a doctrine seems at variance with the rights of owners to clear and use their lands with profit, or bring their farms into a good state of husbandry. Or, in other words, the lot above becomes in this respect the servient tenement to that below. There was no attempt whatever at the trial to assert, much less to prove, any prescriptive right. The real injury to the plaintiff is caused by the omission of the owners below to do as other owners were doing in clearing out the stream.

It is urged, however, and was considered apparently by the learned Judge below, that the defendants had, as it were, undertaken the general duty of clearing out the stream, and that their partial performance of that duty caused the injury to the plaintiff.

The defendants professed by their by-law to make all persons clear out the stream across their lots; and, especially,

in the case of non-residents, but including lands occupied, they assumed the right to get the work done, and to defray the cost by special assessment on the lands. The by-law also declared that the council might use their discretion in granting sufficient time to owners or occupants to clear out the stream, provided the time given should not exceed two years; half the channel to be cleared the first year, and the other half the last year. The evidence shewed that the owner of No. 8, next below the plaintiff, was warned by the defendants to clear out the stream on his lot, but would not do so.

But whether the by-law be or be not within the powers of the defendants, I cannot understand how the plaintiff can acquire any higher or larger right, as against them, for removing or compelling the removal of casual obstructions in the stream above the plaintiff's land, then the latter could have against the owners of the lands had they thought proper to exercise what, I think, was their clear right.

The general views expressed here as to the clearing out of streams, are confined to casual obstructions, such as, drift wood, fallen timber, &c., not to the removal of rocks or bars, or the deepening of natural channels, &c.

We are not called on to discuss whether the plaintiff has any remedy by action against the owner of No. 8, below him.

It is sufficient for us to decide that the corporation have not incurred the liability sought to be fastened on them, by an apparently honest effort on their part to have this creek cleared out.

To hold them liable would, we fear, be a great blow to the progress of improvement, and a discouragement to all municipal efforts to have streams like these properly cleared.

We should feel very clear as to the right of the corporation to force the owner of No. 8 to do this work, or to do it themselves, before we could give way to the plaintiff's argument, that the omission gives him a cause of action against them.

We must not be understood as holding that no such

power exists, or that its clear existence would render them liable to this action.

The clause in the Consol. Stat. U. C. ch. 54, sec. 277, continued down to the last Municipal Act (See sec. 402 of the Act of 1873) gave the power to pass by-laws, for preventing the obstruction of streams, creeks, &c., by trees, brush-wood, timber, or other materials, and for clearing away and removing such obstructions, or otherwise, and for levying the amount in the same manner as taxes are levied, and for imposing penalties on parties causing such obstructions.

This provision seems to point at obstructions actually caused by parties, rather than at the ordinary accumulation of drift wood, &c.

As to the damages in this case, it is hard to see how the \$75 levied from the plaintiff should properly form part of the claim, as the defendants spent it all in clearing the stream on his lot, and no injury whatever was found to have resulted to him therefrom.

The whole ground of action is, that they did not either clear out the stream below him themselves, or force some other parties to do it.

We think the rule in Court below for a nonsuit, should be made absolute.

Appeal allowed.

MATHESON V. KELLY.

Tender—Evidence of, or dispensation with—Illegal distress—Damages.

In order to constitute a legal tender, the money must either be produced and shewn to the creditor, or its production expressly or impliedly dispensed with. ✓

Where, therefore, to prove a tender of a quarter's rent, for which the defendant had distrained, the evidence shewed that the tenant, after refusing to pay some charges and costs which the landlord claimed in addition to the rent, said to the landlord, "Here is the rent,"—which he had, and told the landlord he had, in his right hand in a desk,—but did not produce it or shew it to the landlord, who said nothing and left the premises: *Held*, that there was no evidence of a tender, or of a dispensation with a tender. ✓

Per GWYNNE, J.—To divest a landlord of his right to distrain, a strict legal tender must be shewn. ✓

Where a tenant, to relieve his goods from an illegal distress, pays the amount of the distress and recovers his goods: *Semble*, that in an action of trespass for the wrongful seizure, he is not entitled to recover as damages at least the value of the goods.

THIS was an action of trespass to goods, by a tenant against his landlord.

The cause was tried before Hagarty, C.J.C.P., and a jury, at Toronto, at the Spring Assizes of 1874.

The case was based upon a tender of the quarter's rent having been duly made, before distress. The tender was denied.

No goods were removed, the tenant having paid the bailiff the rent and costs, amounting to \$78, after the bailiff had been some time, under an hour, in possession.

The plaintiff's account of the tender was to the effect that the defendant, (the landlord), came into his shop, and they spoke of the rent, and about some costs claimed by the Corporation. "I refused to pay that. I said, Here is the rent. I had it in my right hand in the desk. The defendant could not see it. I said I had it there, and told him so. He made no answer, but left the place." Again, "The defendant came, and explained the 62c. I said, I'll never pay the watering charges, nor the costs; but here's your money. The money was in the desk, just at my hand. He said nothing about that. He demanded the rent, or about the rent. When I said, I shall never pay

the other things, he at once turned his back, and left the shop, saying nothing."

The plaintiff's son said, "The defendant came, and began explaining the charges. My father said, 'Your rent is here; but I won't pay these charges.' When he said this, the defendant went away. I can't say if he said anything or not. The money still remained in the desk."

The defendant said that the plaintiff never offered him any money, but said he would go and ask his lawyers if he was to pay him; so he went out.

There was also evidence given of alleged prior tenders to the defendant's bookkeeper or manager, and to his brother; but there was no evidence of any authority on their part to receive the money.

On behalf of the defendant it was objected that there was no evidence of a tender or waiver of a tender.

It was agreed that it should be left to the Court to say on the evidence,—drawing inferences of fact—if there was a tender, or a waiver or dispensing with a tender of the rent before distress: the jury to assess the damages.

On the part of the plaintiff, it was contended that as the defendant, after tender, was a trespasser, the damages should at the least amount to the sum paid by plaintiff to get his goods out of distress, allowing nothing for the rent paid.

The learned Chief Justice refused to rule in favor of the plaintiff, but reserved leave to him to move to increase the verdict, in case the jury should find a less sum than the amount paid, and the Court should be of opinion that the plaintiff was entitled to recover such amount.

The jury found for the plaintiff, with \$40 damages.

In Easter term, *E. Crombie* obtained a rule *nisi* to enter a nonsuit, and *McKenzie*, Q.C., obtained a cross rule to increase his verdict, pursuant to the leave reserved.

In this term *McKenzie*, Q.C., shewed cause to the defendant's rule, and supported the plaintiff's. There was clearly evidence of a tender. The evidence shews

that the plaintiff had the money ready in his hand to pay the rent, and offered to do so, but defendant refused to accept it, without the plaintiff also paying some costs, and the rate for street watering. At all events, there was a dispensation with a tender, as the defendant's conduct was such as to amount to an announcement that no tender was necessary, as the amount would not be received: *Harding v. Davies*, 2 C. & P. 78; *Ex parte Danks, re Farley*, 22 L. J. N. S. Bank 736; *Douglas v. Patrick*, 3 T. R. 683; *Wilmott v. Smith*, 1 M. & M. 238; *Barrett v. Deere*, 1 M. & M. 200; *Woodfall*, L. & T., 10th ed., 377, 770, 790. Then as to damages, the defendant having distrained after tender, the distress was illegal, and the defendant was a trespasser *ab initio*, and the plaintiff is entitled to recover the value of the goods distrained, without deducting the amount paid for the rent, and therefore to increase his verdict by that amount: *Attack v. Bramwell*, 3 B. & S. 520; *Branscomb v. Bridges*, 1 B. & C. 145; *Keen v. Priest*, 4 H. & N. 236; *Gillard v. Brittan*, 8 M. & W. 575; *Chandler v. Doulton*, 3 H. & C. 553; *Piggott v. Birtles*, 1 M. & W. 441; *Nargett v. Nias*, 1 E. & E. 439; *Ellis v. Taylor*, 8 M. & W. 415; *Hope v. White*, 22 C. P. 5.

E. Crombie, contra. There was no evidence of tender. The defendant denies that there ever was one, and what took place, according to the plaintiff's own evidence, does not amount to a tender. In order to constitute a tender, the person making the tender must not only have the money with him, but must produce it, and shew it to the party to whom he tenders it; and this was not done here. All the evidence here shews is, that the plaintiff had the money in his hand in the desk, but it was never produced or shewn to the defendant. There was also no dispensation with a tender. To dispense with a tender there must be some announcement made that there is no use in tendering the amount, as it will not be received; and simply walking away, as was done here, does not amount to such an announcement, or constitute a dispensation: *Finch v. Brook*, 1 Bing. N. C. 253; *Leatherdale v. Sweeps-*

tone, 3 C. & P. 342; *Bowen v. Owen*, 11 Q. B. 130; *Field v. Newport, Abergavenny and Hereford R. W. Co.*, 3 H. & N. 409; *Scarfe v. Morgan*, 4 M. & W. 298. As to damages, the plaintiff cannot recover the amount of the rent, and the cases referred to by the other side do not apply here, for in these cases the goods were sold, while here, the plaintiff got his back

HAGARTY, C. J.—Besides the question of tender, there was a good deal of discussion as to the measure of damages.

In the view we take of the case, it is unnecessary to decide any question, except as to the tender.

We are, however, of opinion that the case was properly left to the jury, and that their finding disposed of any objection as to the measure of damages.

It was not like a case where, on an illegal distress, the tenant is tortiously deprived of his goods, and of course the measure of damages would be at least the value of the goods, irrespective of the rent being thereby paid or not.

In *Ex parte Danks, re Farley*, 22 L. J. N. S. Bank. 73, Knight Bruce, L. J., says at page 75: "The rule of law, as I collect from all the authorities, is this, that to constitute a legal tender the money must be there, and must be produced and seen, but with this exception, that the party to whom a tender is made may by his conduct relieve the debtor from the necessity of producing it, by saying that it need not be produced, for he will not take the money if it be."

Lord Cranworth, says: "A tender to be strictly legal, requires that the money tendered should be actually produced, unless the production of it is either expressly or impliedly dispensed with by the creditor."

Leatherdale v. Sweepstone, 3 C. & P. 342, seems the nearest to this in its facts. The defendant offered to pay the plaintiff the amount of his demand, and put his hand in his pocket, but before he could take it out (the money) the plaintiff left the room, and the money was therefore not produced till the plaintiff had gone.

Lord Tenterden, at page 343, says: "This is no tender, the plaintiff got away before any tender could be made. I am always sorry to see a plea of tender on the record, because I know from experience that it is so very seldom made out."

In *Selwyn's N. P.*, vol. i, 13th ed., 187, it is said: "There must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor."

Roscoe's N. P. Evidence, 13th ed., 674, is to the same effect.

Birks v. Trippet, 1 Wm. Saund. (ed. 1871) 33, at p. 42, note *h*, is to the same effect.

The only recent cases in our Courts that I have seen are *Lockridge v. Lacey*, 30 U. C. R. 400, and *Llado v. Morgan*, 23 C. P. 517. Neither of them bear on this point as to tender.

We cannot, on the authorities, hold this to be a sufficient tender. There is no evidence whatever of the waiver or dispensation of an actual and formal tender or offer of the money. It was not, in fact, shewn to the defendant, or actually offered to him, and he neither said or did anything whatever, but simply left the shop.

We fully discussed the question of dispensing with or waiving the necessity of actual tender in *Llado v. Morgan*.

The tendency of modern decisions is rather to relax the strictness required in making a tender, but we do not feel warranted in upholding this proceeding as sufficient in the present state of the authorities.

As the plaintiff fails to prove a tender, the distress was legal, and the action wholly fails.

We need not discuss the alleged prior tender either to the book-keeper, or manager of the hotel, or the defendant's brother. There is a complete absence of proof of any authority, on either of their parts, to receive the money, even if legally tendered to them.

GWYNNE, J.—Although the conduct of the defendant, under the circumstances appearing, seems certainly, I think, to have been harsh, in levying under a distress war-

rant for his rent, I must say that I do not think that there was any such evidence of a tender before distress levied as deprived him of his strict legal right.

The only occasion to which I think we can look for any evidence in the nature of the tender which is pleaded in the fourth count of the declaration, is the occasion when the defendant himself and the plaintiff met upon the 9th day of July, 1873. The defendant's account of what took place upon that occasion is very different from that given by the plaintiff; but taking the plaintiff's own account, I do not think it sufficient to establish a legal tender. It appears that, besides the claim for rent, which was the sum of \$78, the defendant had previously asserted another claim, amounting to \$13.62, for water rate, for watering the street, which he wished to get the plaintiff to pay; and on this same 9th July the defendant's brother had seen the plaintiff upon the subject. Upon that occasion the defendant's brother, as the plaintiff himself testifies, said that the 62c. was for some costs which he, (defendant's brother), could not explain. The plaintiff then says that he offered to pay the \$78 for the rent, but that the defendant's brother said, "Wait till I see the defendant before I accept it, and he went away." "Afterwards, between two and three o'clock the same day, the defendant came to the plaintiff's, and explained that the 62c. was for costs assessed by the Corporation for water. Plaintiff says: "I refused to pay that. I said, here is the rent. I had it in my right hand in the desk. He could not see it. I said I had it there, and told him so. He made no answer, but left the place."

Now, the whole evidence of tender upon which the plaintiff can rest consists in what took place on this occasion, which the plaintiff thus describes himself.

To constitute a legal tender the money must not only be present, but it must be produced, and seen, with this exception, that the party to whom the tender is made, may, by his conduct, relieve the debtor from the necessity of producing it "*by saying that it need not be produced, for that he will not take the money if it be.*" *Ex parte Danks, re Farley*, 22 L. J. N. S. Bank. 75.

In re Owners of the Norway v. Ashburner, 3 Moore, P. C. N. S. 245, at p. 266, it is said that claiming a larger sum than is due will not dispense with the necessity of a tender, unless the demand of the larger sum was so made that it amounted to an announcement by the creditor that it was useless to tender any smaller sum, for that if tendered it would be refused.

In such case, it is said, that would amount to a dispensation with any tender, *generally speaking*.

Now, in the first place, it is to be observed, that upon the occasion referred to, the defendant was making no demand of any sum in particular at all; at least we have no evidence whatever that he was. The conversation opened, as appears, by an explanation of the sum of 62cts. And the plaintiff does not allege that he himself did more than say that he had the rent in his desk, but he does not say—although that is, perhaps, what he intended to imply—that he offered then to pay it to the plaintiff. But what is most material is, that he does not pretend that the defendant said anything which could amount to an announcement that there was no necessity for his producing the amount, for that he would not take it.

It appears to me that the case of a landlord having a claim for rent, although he may have another claim which he is demanding payment of also, is not precisely similar to the case of a person making a demand for a larger sum, as a debt, than he was entitled to demand, and the debtor offering to pay, without producing, a smaller sum, which was all that was in fact due; in such a case the tender will not be good without production of the money in sight of the creditor, unless the latter announces something to the effect that it will be unnecessary to produce the smaller sum, for that he will not accept it. But in the case before us the plaintiff assumes the onus of establishing that he has divested the landlord of his vested right to distrain for his rent. I am inclined to think he can only do that by proving a strict legal tender. The landlord had a claim certain for rent; it was not neces-

sary for him to demand it at all, nor was there any dispute as to its amount. He had also, or claimed to have, a demand for another sum; an ordinary debt or demand for which he could not distrain. Assume that he does go to demand his rent, which he need not do, and at the same time makes a demand for the amount which is wholly unconnected with the rent, and for which he could not distrain; that does not appear to me to be at all the case of a person making a demand of a larger sum than is due. Nor can the tenant, who undoubtedly owes the rent, so treat it. The demand in such a case is two-fold, namely, for the rent, for which he has a right to distrain, and for the debt for which he has no such right. In order to divest his landlord of his acquired right to distrain for his rent in arrear, it appears to me that he should make a strict legal tender of that amount; it is not as in reply to a demand made upon him that his acts are to be viewed. The initiation must be taken by him; namely, by production of the money, and tender of it to his landlord, who cannot otherwise be divested of his legal right then already acquired. At any rate, he cannot be divested of his right by saying nothing when informed by the tenant that he has the rent in his desk, and by walking away before any money was produced to or seen by him. To entitle the plaintiff to bring this action, he should, in my opinion, have followed the landlord with the rent, and tendered it to him in strict form.

There is another point which appears to call for a few words of observation; it relates to the rule moved on behalf of the plaintiff. The plaintiff's counsel asserted a right to recover in the action without the plaintiff being *tout temps prist*, to pay the rent after the alleged tender, although such readiness has to be pleaded in a plea of tender. Had he been so ready the distress need never have been made, for payment to the bailiff before distress levied would have been good; but the point of the plaintiff's rule is, that having waited until the bailiff had levied before he paid the rent, payment then to him is not to be consid-

ered as payment of rent at all, but as money wrongfully extorted to relieve his goods wrongfully seized after tender, although the plaintiff, after the alleged tender, until seizure, was not ready or willing to pay the rent.

The defendant's harshness in signing the distress warrant seems to me to have made the plaintiff anxious to make a cause of action, by suffering the distress to be made, by not paying the rent, which he professes to have been willing to pay.

The defendant's rule will be made absolute, and the plaintiff's discharged.

GALT, J. concurred.

Rules accordingly.

MCADIE V. SILLS.

Agreement—Parol evidence to explain—"Lumber."

In an action on the following agreement: "Due W. M. \$100, payable in lumber," &c.: *Held*, that "lumber" being the general term used for different kinds of lumber, parol evidence was admissible to shew what kind of lumber the parties intended, namely, "culls and joists."

THE first count of the declaration was on an agreement to pay \$100 in lumber.

The common counts also were added.

The cause was tried before Hagarty, C. J., C. P., and a jury, at Belleville, at the Fall Assizes of 1874.

At the trial the agreement, which was in the following terms, was put in:

"Due William McAdie, \$100, payable in lumber, on demand, at the Stinson Mill."

The contest between the parties arose as to the construction to be placed upon the word "lumber"—the plaintiff contending that it must mean at least common lumber, which he was willing to accept; the defendant, on the other hand, asserting that, at the time when the due bill was drawn, it was understood and agreed that the term

“lumber” was to be limited in its operation to “culls and joists.”

The learned Chief Justice received parol evidence to explain the sense in which the contracting parties used the term “lumber,” and thus left the case to the jury, reserving leave to the plaintiff to move to enter a verdict for him, in case the Court should be of opinion that this evidence was improperly received.

The jury found a verdict for the defendant.

In Michaelmas Term, *McKenzie*, Q.C., obtained a rule *nisi* on the leave reserved.

In this term, no one appearing to shew cause, *McKenzie*, Q.C., supported the rule. The evidence to shew what kind of lumber was meant was clearly inadmissible. The writing says lumber; that means merchantable lumber, and parol evidence is not admissible to shew that the defendant intended “culls” “joists.” Consol. Stat. C. ch. 46, sec. 26, shews that lumber means merchantable lumber, and that “culls” are what is rejected as not coming up to the description of lumber, and are termed “rejected” or “culls.” *Smith v. Jeffreyes*, 15 M. & W. 561, is in point, and shews that the evidence was inadmissible. See also *Goss v. Lord Nugent*, 5 B. & Ad. 58.

GALT, J.—The learned counsel relied strongly on the Act respecting the cutting and measuring of lumber, Consol. Stat., ch. 46, because, in the 26th section, a distinction is drawn between different descriptions of deals; for the proviso has no reference to any other description of lumber.

The Act itself, however, is very different, and appears from the first clause to treat all descriptions of wood forming an article of commerce, not including fire wood, as lumber. The words are: “The Governor may appoint a fit person, well skilled and practically acquainted with the lumber trade of the Province, to be the Supervisor of Cullers, who shall supervise and control the culling, measuring, and examination of every description of lumber in the manner hereinafter prescribed.”

It is, therefore, plain that the term "lumber" is a word signifying a variety of articles; and the question is, whether a Court is at liberty to receive parol evidence, not to vary, but to explain a written agreement.

There is no doubt that the ambiguity in this case is latent, and not patent; and it has always been held that in such a case parol evidence is admissible. Under the term "lumber" all descriptions of wood are included—such, for example, as oak, pine, hemlock, walnut, and a variety of others. It must therefore of necessity be competent for the parties to shew what particular description of lumber was intended.

But it was argued by Mr. McKenzie that the term "culls" cannot be applied to any description of lumber, for the reason that the 26th sec. of ch. 46, above referred to, after enumerating deals, proceeds as follows: Merchantable shall be marked I; second quality shall be marked II; third quality, (if made), shall be marked III; rejected, or culls, shall be marked X.

It appears to me that this argument tells against the plaintiff, for the reason that the article rejected does not cease to be lumber, but, being of an inferior quality, it is to be marked as such.

The term "culls," as defined by Webster, is: "Refuse timber from which the best part has been culled out."

It seems, therefore, that under the general phrase "lumber," culls must be included.

It might be open to another question, if merchantable or any other particular description of lumber had been used: for in such case it might well be argued that culls could in no sense be said to fall within such a definition.

There is another point which must not be overlooked: namely, the defendant swore that under this due bill joists as well as culls were intended, and the jury by their verdict found that this was the case; and unquestionably joists must be considered as lumber.

The case of *Smith v. Jeffreyes*, 15 M. & W. 561, was relied on by the plaintiff as in his favor; but

it appears to me that the decision in that case will not apply. The agreement there was, "I hereby agree to sell to Mr. Smith" &c. "sixty tons of ware potatoes," &c. At the trial it was shewn that there were two kinds of ware potatoes, and the plaintiff offered evidence, which was objected to but received, that he had in fact contracted for the purchase of the best quality of a particular kind, namely, Regent's wares, whereas those which the defendant had offered to deliver were wares of a different, and, as the plaintiff alleged, an inferior kind, namely, kidney wares. The plaintiff had a verdict, which the Court set aside, as they considered the evidence inadmissible, on the express ground that it went to vary and limit the written contract between the parties.

Now in the case before us, assuming, as I do, that culls and joists are lumber, the plaintiff by his claim to receive a particular description of lumber, is attempting to put a limited construction on the written agreement, and in effect doing by his act what the Court held the plaintiff in *Smith v. Jeffreys* could not do by evidence.

As to the law bearing on the subject of the admissibility of evidence in cases like the present, the cases are summed up in the case of *McCarthy v. Vine*, 22 C. P. 458.

We are of opinion that in this case, in place of discharging the rule, which might place the plaintiff in a difficulty in enforcing his claim against the defendant, we should direct a nonsuit, if the plaintiff so desire.

HAGARTY, C. J.—The rule is laid down thus in *Taylor* on Ev., 6th ed., vol. ii., sec. 1082: "Extrinsic evidence of every material fact, which will enable the Court to ascertain the nature and qualities of the subject matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received." And see the cases there cited.

In *Macdonald v. Longbottom*, 1 E. & E. 977, Lord Campbell says, at page 982: "When there is a contract for the sale of a specific subject matter, oral evidence may be received,

for the purpose of shewing what that subject matter was, of any fact within the knowledge of the parties before and at the time of the contract."

Erle, J. says, at page 986 : "Oral evidence is, undoubtedly, admissible to identify the subject matter of the contract."

In the same case, in Error, *ib.* 987, Williams, J., says : "That evidence does not vary the written contract, but only identifies the subject matter to which it refers."

Byles, J., says, at page 989 : The "evidence, to be admissible, must not vary, but apply, the contract."

Newell v. Radford, L. R. 3 C. P. 54, is also very clear on this point.

On the trial, it was plain, I think, that "culls" and "joists" came under the general term "lumber."

It was proved, I think, very satisfactorily, and so found by the jury, that the defendant's account of the bargain was true ; so that the matter amounts to this, "I will pay you in lumber."

Evidence may, I think, be admitted, that this general term "lumber" may be fixed and identified as the kind of lumber which defendant had on hand.

GWYNNE, J.—Upon the authority of all the cases, which which are collected in *McCarthy v. Vine*, 22 C. P. 458, the evidence was, in my opinion, admissible.

Indeed, in the view I take of the contract, the evidence need not have been offered, for delivery by the defendant of anything coming within the description of the general term lumber, to the value of \$100.00, would have been a fulfilment of his contract ; and "culls" and "joists," although the former is an inferior description of lumber, do come within the term "lumber."

What the plaintiff asks us to do is indeed, in substance, to construe the contract so that he shall have only the best description of lumber ; and the case which the learned counsel for the plaintiff relied upon shews that he could not have called evidence to establish that this was the intention of the parties.

Rule accordingly.

CULVERWELL V. LOCKINGTON.

Easement—Evidence—Stove-pipe passing through adjoining house.

The owner of a house subdivided it, and let the north part to one G. This consisted of two rooms, a front and back room, the front room having a chimney, but not the latter. G. had a stove in the back room, and the only way he could use it was by passing a stovepipe through a hole in the partition between his and the south part, and thence into the chimney in that part. The owner subsequently leased the south part to defendant, who at the time he became tenant was aware of the existence of the stovepipe. G. afterwards assigned to the plaintiff, and on leaving took down the pipe. The plaintiff, on coming in, put up a pipe of his own, with the consent of, or, at least, without any objection by defendant. The defendant having afterwards taken down the pipe and stopped up the hole :

Held, that he was a wrong-doer in so doing, for that he only held the south part subject to the user or easement of the plaintiff of the stovepipe and hole.

THE declaration contained three counts.

The first count was in trespass, alleging that the defendant took the plaintiff's goods, that is to say, a certain stovepipe of the plaintiff, then being in use by the plaintiff, for the purpose of carrying the smoke from the stove of the plaintiff to the chimney wherein the smoke escaped to the open air, and severed, cut, and damaged the same, and by such injuries done thereto rendered it unfit for use; and the smoke from the stove of the plaintiff, instead of passing through the said stovepipe to the said chimney, escaped from the said pipe and filled the room and dwelling of the plaintiff with smoke, and rendered it uninhabitable, &c.

The second count was the one on which the case principally turned, and was as follows : for that the plaintiff was at the said time when, &c., lawfully possessed of a store and dwelling house in the city of Toronto, on Yonge street, and the defendant was possessed of a certain other dwelling house and shop adjacent thereto; and the plaintiff says he was entitled to enjoy, and of right enjoyed, the rights of extension of a certain stovepipe in the premises of the plaintiff in and through a portion of the dwelling house and shop of the defendant, and then into a certain chimney therein, and that the smoke from the fires in the premises of the plaintiff escaped thereby; yet that the defendant, mali-

ciously intending to injure the plaintiff in that behalf, cut, broke, and destroyed that portion of the said stovepipe passing in and through the said shop and dwelling house of the defendant, and thereby prevented the smoke, issuing from the premises of the plaintiff, from passing through the said stove-pipe, and thus escaping in and through the said stovepipe and through the said chimney; and the plaintiff was thereby put to great inconvenience in consequence of the said escape of smoke being prevented, &c.

The third count was for the wrongful erection by the defendant of a building and wall in so improper a manner that large quantities of snow, which, but for the said building and wall so erected by the defendant, would have fallen at a distance from the premises of the plaintiff, were driven together and collected in large quantities against the wall and near the premises of the plaintiff, and then melted and flowed down in and upon the premises of the plaintiff, &c.

To this declaration the defendant pleaded not guilty; and also pleas raising the question as to the right of the plaintiff to have the stovepipe passing through the defendant's premises.

The cause was tried before Richards, C. J., and a jury, at Toronto, at the Spring Assizes of 1874.

From the evidence given at the trial it appeared that the plaintiff and the defendant occupied adjoining premises on Yonge street. The house was originally one tenement, but the landlord had divided it into two shops, the division being made by a board partition of inch boards. In this partition there was a stovepipe hole.

On the 1st of January, 1869, Jones, the landlord, demised the north half to one Gair for one year, describing the premises as merely "that house and premises, situate," &c.

On the 16th June, 1869, Gair sold the good-will and assigned the lease to the plaintiff, with the landlord's assent endorsed thereon.

On the same day Jones, the landlord, demised to the

plaintiff the premises, with all houses, out-houses, and appurtenances thereto belonging, or known as part and parcel thereof, or as belonging thereto, with the use of a well on the premises immediately to the south. Habendum for one year, with the right to continue for two years on giving a notice.

On the 10th of February, 1872, Jones again demised to the plaintiff, with the same words as to appurtenances and use of the well. Habendum for six years.

On the 23rd of February, 1869, Jones demised to the defendant for one year from the date thereof the house and premises, situate, &c., "joining the landlord's premises on the south and twelve feet on Yonge street." Nothing was said as to appurtenances; and the defendant agreed to give a right of way through said yard to the well to any party living in the next house north.

The north half of the building, the part demised to the plaintiff, consisted of two rooms on the ground floor the front room being about 35 feet in length and the other about 15. In the front room there was a chimney, but none in the other.

Gair proved that at the time he became tenant there was a stovepipe hole in the partition, and that the only way in which he could use the stove in the back room was by passing a pipe through the partition.

The defendant stated that at the time he went to look at the place there was a pipe running from Gair's place into the chimney on his side: that when the plaintiff came in, (June, 1869), Gair took his pipe away; and that the plaintiff applied to him to allow him to put his pipe in, which he did.

It appeared that this state of things continued from that time, June, 1869, until January, 1873, when, in consequence of disputes between these parties, arising from other causes, the defendant removed the stovepipe of the plaintiff, and closed the stovepipe hole in the partition.

The landlord stated he was not aware there was any stovepipe hole, and that he did not know who had cut it, or by what authority.

The premises occupied by the plaintiff were numbered 265, and those occupied by the defendant as 263.

At the conclusion of the trial the learned Chief Justice submitted the following questions to the jury:—

1. As a matter of fact were the premises, No. 265, occupied before the defendant leased the adjoining building as a separate house and premises, and was the stovepipe, passing through the partition, used for the enjoyment of that building, and was it necessary for such enjoyment, and did it continue to be so used and enjoyed up to the time the defendant took No. 263? Answer: yes.

2. Did the defendant know the pipe was so enjoyed and was necessary to be used for the reasonable enjoyment of the premises; and, as a matter of fact, do the jury consider that the defendant took the premises subject to the right of the other tenant so to use the stovepipe, and as a matter of fact, did not his premises extend to the partition then existing between the two houses? Answer: yes.

3. Did the defendant make the stove-pipe hole in the rear before the plaintiff came there? Answer: yes. And when the plaintiff took his lease did it cover more of the yard than up to the north side of the fence that now exists dividing the yard? Answer: we think he took by the fence as it now stands.

4. Did the defendant's shed have the effect of collecting the snow and throwing it against the plaintiff's premises; or was the snow, which collected there, what would blow in without any fault in the mode of the defendant's building his roof; say, suppose he had built his house and the roof had dipped the other way. Answer: we think the construction of the roof had the effect of throwing the snow against the plaintiff's premises, but he received no injury from it.

Upon these answers being made a verdict was entered for the plaintiff, damages \$150, with leave to the defendant to move to enter a nonsuit, and to reduce the verdict as to the last count to nominal damages.

In Trinity term *Rose* obtained a rule *nisi* pursuant to the leave reserved.

In Michaelmas term *Hagel* shewed cause. The defendant is clearly a trespasser in removing the stove-pipe and closing up the hole, as it is clearly proved, and the jury have so found, that when he took the south part of the house he knew that the stove-pipe and hole were there, and that they were being used. He therefore took, subject to the plaintiff's easement. The case of *Pyer v. Carter*, 1 H. & N. 916, is exactly in point. There it was held that when the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit, and is subject to the burthen of all existing drains communicating with the other house, without any express reservation or grant for that purpose. This clearly shews that there is such an easement in the plaintiff as entitles him to maintain the action. In a later case, of *Suffield v. Brown*, 4 DeG. J. & S. 183, this case was questioned, but the point was not necessary for the decision of the case, and *Pyer v. Carter* has been approved of and followed, and *Suffield v. Brown* dissented from, in all the subsequent cases: *Watts v. Kelson*, L. R. 6 Ch. App. 166; *Young v. Wilson*, 21 Grant 144; *Gale on Easements*, 4th ed., 85-90. The fact of the express reservation of the right to use the well may be set up to shew that there is no implied reservation of the stovepipe; but, as laid down in *Polden v. Bastard* 4 B. & S. 258, in the case of a well, there must be an express reservation, because there is no continuous easement, the right of way to go and return from the well not constituting such an easement. As to damages, there is no objection that they are excessive.

Harrison, Q. C., contra. There is no easement or right of user in the plaintiff which would entitle him to recover. This is clearly laid down in *Suffield v. Brown*, 4 DeG. J. & S. 180, where it is said, that unless there be an express reservation of such right, none exists, for that the grantor cannot derogate from his own grant, and *Pyer v. Carter*,

1 H. & N. 916, is dissented from. And in *Crossley & Sons, Limited v. Lightowler* L. R. 2 Ch. App. 478, Lord Chelmsford refers to *Suffield v. Brown*, and approves of the law as there laid down. The fact also of the right to use the well being expressly reserved would shew that it was never intended to grant the right to use the stovepipe : *Polden v. Bastard*, 4 B. & S. 258 ; *Drewell v. Towler*, 3 B. & Ad. 735. The cases, however, shew that the user must be of necessity or continuous, and it clearly is not so here ; for there is nothing to prevent the plaintiff from building a chimney for himself ; and it is admitted that when Gair left he took down the pipe : *Pearson v. Spencer*, 1 B. & S. 571 ; *Dodd v. Burchell*, 1 H. & C. 113 ; *Russell v. Harford*, L. R. 2 Eq. 507 ; *Thomson v. Waterlow*, L. R. 6. Eq. 36 ; *Langley v. Hammond*, L. R. 3 Ex. 161 ; *Butterworth v. Crawford*, 7 Amer. Rep. 352 ; *Maynard v. Esher*, 17 Pennsylvania 222 ; *Johnson v. Jordan*, 2 Metcalf 234 ; *Edinburgh Life Ass. Co. v. Barnhart*, 17 C. P. 63.

HAGARTY, C. J., delivered the judgment of the Court.

The point to be decided here seems to me one almost wholly of fact, and it does not seem necessary to review the numerous authorities, many of them conflicting, that were cited. When the defendant took the south tenement as a yearly tenant, we have no formal writing to guide us as to the extent of the demise. We must therefore ascertain what in fact he did take.

When he entered as tenant, the stove pipe from the north tenement was there, passing through the partition a short way through the south tenement into the chimney.

The defendant must have seen and known of this visible use of the tenement he was taking.

After a while, Gair, who occupied the north, removes the pipe on leaving ; the plaintiff then comes in, and puts back a pipe of his own there, with defendant's assent, or, at least, without any objection.

Then I gather, as the fair result of the evidence and the findings of the jury, that the defendant became tenant of

the south tenement, subject to this visible easement, appurtenant to or used with the north tenement, the southern tenement being so far servient to the northern.

If so, he was a wrong-doer in his interference with this easement, and the verdict is right.

The defendant did not in fact, as he contends, become the absolute possessor of all the space comprised within the four walls of his holding, but only of that, subject to the passage and use of the plaintiff's pipe.

The common landlord was an assenting party to this user of the partition and chimney, prior to the defendant's occupation.

I cannot understand how it can be insisted that the defendant acquired any larger interest than was in fact demised to him, and that was the possession of the southern tenement subject to this easement.

It is clear to me, that if the owner of both tenements himself provide means for the smoke of the fire-place of one to pass partly through the other into a chimney, such a proceeding being necessary for the proper enjoyment of the former, and then demise the former to a tenant in the ordinary way, who takes it with that visible means of carrying away the smoke, that he takes it with the easement attached or appurtenant.

If this stand on the same footing as a drain running from the former house under the latter, then, according to the much discussed case of *Pyer v. Carter*, 1 H. & N. 918, the right to use the drain would pass to the purchaser of the former tenement, without any express reservation or grant; and when a purchaser afterwards took the south tenement he took it subject to that right.

The Court say: "We think it was the defendant's own fault that he did not ascertain what easements the owner of the adjoining house exercised at the time of the purchase."

Lord Westbury was pleased to express his dissent from this case in *Suffield v. Brown*, 4 DeG. J. & S. 190, but such an opinion seems unnecessary for the determination of the case before him.

And in *Watts v. Kelson*, L. R. 6 Ch. App. 166, the Lord Justices express themselves as quite satisfied with *Pyer v. Carter*, as being "good sense and good law," notwithstanding *Suffield v. Brown*. This was in 1870.

In 1867, in *Crossley & Sons, Limited, v. Lightowler*, L. R. 2 Ch. App. 478, Chelmsford, C., approves of Lord Westbury's decision in *Suffield v. Brown*, but the case before him was widely different from the present.

Lord Justice Mellish says in 1870, in *Watts v. Kelson*, that most of the Common Law Judges have not approved of Lord Westbury's observations.

He cites the words of Erle, C. J., in *Polden v. Bastard*, in error, L. R. 1 Q. B. 156: "There is a distinction between easements such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shews an intention that they should pass."

This is the general law. I think the facts here narrow the case down to the mere statement that the occupant of the northern house was allowed by the owner to enjoy this easement over the southern house, while still in the owner's control; and that when the defendant took the southern house he took it with full notice of such easement and subject thereto.

In this view the verdict for the plaintiff should stand on the second count.

As to the claim respecting the snow, the jury found there was no damage.

Admitting that nominal damages, in the absence of actual damages, may properly be recovered where a right is invaded, there is no reason here that a recovery should be allowed. The defendant was merely a yearly tenant, and we do not see how any question as to right can arise.

Our judgment therefore is, that the verdict stand for \$150 for plaintiff on second count, and for the defendant on the other counts.

Rule accordingly.

PARKE V. DAY.

Insolvency—Discharge—Waiver of objections thereto—Right to assign when no assets.

Some nine years after defendant had obtained his discharge in insolvency, the plaintiff, a scheduled creditor, issued a *fi. fa.* against defendant's goods on a judgment recovered before the discharge, contending that the discharge was void, because defendant had, previous to his assignment fraudulently allowed a judgment to be recovered against him and his assets taken; and, also, because, his assets being so taken, there was nothing at the time of the assignment on which it could operate. It appeared, however, that the plaintiff consented to the assignment, and did not appeal from the order of discharge; nor did he, when the discharge was being granted, raise the objection of no assets.

Held, that the *fi. fa.* goods must be set aside; and that the plaintiff's remedy, if any, was by action on the judgment.

Semble, however, that the plaintiff, by his conduct and the lapse of time, was precluded.

IN Hilary term, *Delamere* obtained a rule *nisi*, on behalf of the defendant, to set aside a writ of execution against the goods of the defendant, in the hands of the Sheriff of Frontenac, on the ground that the defendant was duly discharged under the Insolvent Act of 1864.

It appeared that in November, 1864, Calvin W. Day, the younger, being a judgment debtor of his father, Calvin W. Day, and of the above plaintiff, these persons being his sole creditors, and all the said debtor's goods having been seized and sold by his father, under his execution, in October of that year, without satisfying, as was said, his debt, called a meeting of his creditors, under the Insolvent Act of 1864. These creditors,—namely, the father and the above plaintiff,—signed a consent to the appointment of an assignee in insolvency, as follows:

“We, the creditors of Calvin W. Day, the younger, hereby consent to the appointment of Roderick M. Rose as official assignee of Calvin W. Day, the younger, under the Insolvent Act of 1864.”

(Signed) “CALVIN W. DAY.”

(Signed) “THOS. PARKE.”

Thereupon an instrument, purporting to be an assignment in Insolvency, under the Insolvent Act of 1864, dated the 10th December, 1864, was executed by the said Calvin W. Day, the younger, to Roderick M. Rose, as official assignee.

A copy of a paper, purporting to be a discharge in Insolvency, signed by the Judge of the County Court of the County of Frontenac, and purporting to discharge the said insolvent from all liabilities, was filed on this application. The above plaintiff had, notwithstanding, lately issued execution upon his judgment recovered in 1864.

The plaintiff filed an affidavit of the assignee, Mr. Rose, who swore that no assets of any kind or value whatever were assigned by the said insolvent to him, or received by him in any way: that on the 18th March, 1865, he examined the said insolvent upon oath, and put to him the following question: "Have you any estate for the benefit of your creditors?" To which the insolvent's answer was, "None whatever;" and the assignee took his note for his charges as assignee.

The plaintiff also filed his own affidavit, in which he charged that the insolvent delayed him in the recovery of his judgment by pleading thereto, while he suffered his father to recover judgment by default of appearance; and so that he, on purpose to defeat the plaintiff's claim, enabled his father to sweep away all his assets.

The plaintiff proceeded to say, that, "in the month of November, 1864, the said Calvin W. Day, the younger, called a meeting of his creditors, namely, his father and myself; and his father and I named Roderick M. Rose, Esquire, as the assignee, to whom the assignment should be made, under the Insolvent Act of 1864."

He further said that "the same attorney-at-law *defended*; brought his father's action, and acted for the said Calvin W. Day, the younger, in the proceedings in Insolvency."

He said further, "I believed then, and still believe, that the object of the said Calvin W. Day, the younger, throughout these proceedings, was to deprive me of any

share in his estate, and to give the whole of his property to his father in satisfaction of his claim. I was at that time willing, and offered to take *pro ratâ* with his father, the said sum of \$660, (namely, a sum realized under his father's execution), and discharge the said Calvin W. Day the younger; but his attorney would not pay anything at all to me."

He further added: "The said Calvin W. Day, the younger, in the year 1866, before he obtained his discharge, represented to his assignee and myself that he had no assets whatever to divide amongst his creditors, that no debts were owing to him, and that he had no estate, real or personal, of any account, at the time of the assignment."

The plaintiff also filed another affidavit, verifying a copy of the examination of the insolvent at the time of his applying for his discharge, and which the plaintiff obtained from the Judge of the County Court of the County of Frontenac, in the month of April, 1866, in which month, as the plaintiff said, the examination of the insolvent took place, although the discharge appeared to have been dated in error, the 26th February, 1866. The plaintiff said that his own evidence was at the same time taken also by the Judge.

In this term, *J. R. Roaf* shewed cause. The defendant cannot set up the discharge as an answer to the plaintiff's claim for the discharge was invalid. In order to make an effectual assignment the insolvent must have some assets upon which the assignment can operate. This was laid down in an unreported case of *Thomas v. Hall (a)*, and it is proved here that he had none. The assignment is also void for fraud. It is shewn that the plaintiff and the insolvent's father were the only creditors of the insolvent, and the insolvent, previous to the assignment, and acting in collusion with his father, allowed his father to obtain a judgment against him, and sweep away all the assets.

(a) Since reported in 6 P. R. 172.

The cases shew that an assignment made under these circumstances is void; and the assignment, therefore, being void, the discharge based on it is also void: *Horn v. Ion*, 4 B. & Ad. 78; *Ex parte Harris*, 9 L. T. N. S. 239.

Delamere, contra. The plaintiff cannot now question the validity of the discharge, but should have appealed from the order of the Judge granting it. The granting it was a matter for the discretion of the Judge, and as the plaintiff did not appeal against the exercise of that discretion he is now estopped from doing so, and the discharge is valid: *Re Perry*, 2 U. C. L. J. N. S. 75; *Re Thomas*, 15 Grant 196; *Thompson v. Rutherford*, 27 U. C. R. 205; *Re Neumark*, 6 L. T. N. S. 675; Insolvent Act 1864, sec. 7, sec. 9, sub-sec. 9; Insolvent Act 1865, sec. 4.

GWYNNE, J., delivered the judgment of the Court.

The plaintiff has filed the examination of the insolvent, but it is of no importance further than to shew that the plaintiff was resisting the insolvent's application for his discharge, upon the ground of his having allowed his father to obtain judgment against him, while he was delaying the plaintiff in the recovery of his; and the examination stated that there were no assets: that at the time of his examination he had no property, nor did any one owe him anything.

The plaintiff rests his claim to be allowed to proceed to enforce his judgment by execution now upon a renewal of the charge that the whole proceedings of the insolvent in the insolvency was with intent to benefit the father to the plaintiff's prejudice; and he now insists, that there never having been any assets for the assignment in insolvency to attach upon, the assignment and discharge are void. He rests for his contention upon a judgment of mine in Chambers, in *Thomas v. Hall*, unreported (a); but that judgment does not profess to decide that an assignment in

(a) Since reported in 6 P. R. 172.

insolvency, executed by a person having at the time of its being executed no property, is for that reason void. On the contrary, while commenting on the decision, in *Re Thomas*, 15 Grant 196, I said that "I could well understand that it should be held, inasmuch as the Insolvent Act passes under a voluntary assignment to the assignee not only what real and personal estate the insolvent then had, but also whatever should in any way come to or devolve upon him before obtaining his discharge, that the mere fact of the insolvent not having any assets at the date of the assignment should not avoid the assignment." And I added that, "to hold, when an insolvent comes for his discharge upon a voluntary assignment, that he should be entitled to it, notwithstanding that at the time of the execution of the assignment he had no assets whatever, nor any expectation of any, nor had since acquired or possessed any whereon the assignment could attach, and so had in fact given up nothing to his creditors, appears to me to be a perfect mockery of the Insolvent Act."

I confess I entertain this opinion still, and so strongly that I have little doubt I should act upon it, if sitting in an appellate tribunal on an appeal from a discharge granted under such circumstances. But inasmuch as the statute gives an appeal from the decision of the Judge in insolvency granting a discharge, which step has never been taken, it cannot be imagined, because I adhere to the opinion I expressed in *Thomas v. Hall*, that nine years after, or at any distance of time after a discharge, in insolvency, which had not been appealed, had been granted by the Judge in whom the statute confides this jurisdiction, I should upon motion treat that decision, so unappealed, as void.

The assignment itself not having been *ipso facto* void, the jurisdiction of the Court attached, so that the granting or refusing a discharge, in such a case, is a question not of jurisdiction so much as the exercise of a legal discretion and, if not appealed, it may be found very difficult, if not impossible, after the time for appeal has elapsed, to call it in question, except it be assailable upon the ground of

having been obtained by fraud. But that is a question,—namely, what in such a case will constitute fraud in law or in fact, so as to *avoid* a discharge executed in fact—which must be raised by some suit upon a record properly framed for that purpose, and not on a motion.

In the present case it may possibly be found that the plaintiff by his own conduct has interposed very serious difficulties in the way of his recovering in any such issue. He himself in writing consented to the execution of the deed which he now wishes to assail. He was as well informed then as he is now of the matters which he relies upon as sufficient to avoid the discharge. Although cognizant of the fact that there were never any assets upon which the assignment in insolvency could operate, he opposed the discharge, but not upon that ground. He made no such objection then, although he did submit nine objections to the consideration of the County Judge as sufficient, in the plaintiff's opinion, to prevent the discharge being granted. Having submitted these objections to the Judge, and the Judge having determined against them and granted the discharge, the plaintiff did not appeal from that decision, but has submitted thereto for nine years.

The plaintiff, if advised to raise the question under these circumstances, will do well to consider whether the judgment in *Thomas v. Hall* supports his contention. The plaintiff must exercise his own discretion in determining whether he will raise the point by bringing an action on his judgment.

The rule will be made absolute to set aside the *fieri facias* and the subsequent proceedings.

Rule absolute.

McINTOSH ET AL. V. SAMO.

Lease—Construction of—Condition or covenant—Right of entry.

In a lease there was no express proviso for re-entry, but the lease was stated to be made "subject to the following stipulations." Then followed a number of clauses, one of which was that the lessee should not assign the lease without the consent in writing of the lessor:—*Held*, that the words "subject," &c., had not the effect of making the succeeding clauses conditions, so as to cause a forfeiture and right of entry for their breach; and therefore that ejectment would not lie for assigning the lease without the consent of the lessor.

EJECTMENT, to recover part of Park Lot No. 8, in the City of Toronto

The plaintiffs claimed title by virtue of a breach of a condition contained in a lease.

The defendant, besides denying the plaintiffs' title, claimed title under the lease.

The cause was tried before Richards, C. J., and a jury, at Toronto, at the Spring Assizes of 1874.

The lease was put in evidence, and was as follows:

"This indenture made between John McIntosh, of the City of Toronto," &c., "of the first part, and Joel Wells, also of the said City of Toronto, merchant, of the second part, witnesseth that the said parties of the of the first part have leased," &c., for a term of ten years from the 1st July, 1871, unto the said parties of the second part, the land and premises in this suit, describing them. The lease then proceeded:

"This lease is thus made subject to the following stipulations, namely: 1. That the said lessee shall consult with the said lessors or their representatives before making any alterations to the said buildings. 2. That the said lessee shall make all alterations, additions, and repairs at his own expense during the present lease. 3. That the said lessee shall pay all city taxes and assessments imposed or that may be imposed during the term of the said lease. 4. That the said lessee shall constantly keep the hereby leased premises furnished according to law for the security of the rent hereinafter stipulated. 5. That the said lessee shall not make over his

interest in the present lease, or sublet the whole or any part of the said premises hereby leased, without the consent of the lessors being first obtained in writing for that purpose. 6. That in the event of the said buildings being destroyed by fire at any time during the said lease, this lease shall then be null and void. 7. That at the termination of this lease the said lessee shall peaceably surrender the said premises unto the said lessors in good condition, usual tear, wear, fire, and unavoidable casualties excepted. 8. This lease is further made in consideration of the sum of \$5,500 of lawful money of Canada, for the rent of the aforesaid premises for the said term of ten years from the 1st July, 1871, which sum the said lessee binds and obliges himself to well and truly pay to the said lessors or their legal representatives in manner following, that is to say: that for and during the first four years of the aforesaid term, the sum of \$1,600 in equal quarterly payments of \$100 currency each payment, the first payment whereof to be due and payable on the first day of October next; and for and during the next six years ensuing of the aforesaid term the sum of \$3,900, payable in equal quarterly payments of \$162.50 currency each payment: the first payment whereof to be due and payable on the 1st October, 1875. 9. It is further agreed that if the said parties of the first part named in the within lease should decide to sell the said premises at any time during the term of this lease, the said party of the second part, named in this lease, shall have the first right of refusal to purchase the said premises at whatever price may be decided upon by and between the said parties of the first part. 10. It is further agreed that whatever addition or repairs may be deemed requisite and made by the said lessee to the said building, shall remain at the termination of the lease without any cost or expense to the said lessors."

"Signed, sealed, &c."

It was admitted that by an indenture, by way of assignment, dated 3rd September, 1873, Wells, the lessee, had assigned the premises to the defendant.

It was contended on behalf of the plaintiff that the words,

"subject to the following stipulations," had the effect of making the succeeding clauses, namely, from 1 to 10, conditions; and that for their breach the term became forfeited, and a right of entry accrued, and that the lessee having broken the 5th clause by assigning to the defendant without the consent of the lessors, the lease became forfeited, and the plaintiffs had the right to recover.

On behalf of the defendant it was contended that these clauses merely amounted to covenants and not conditions, and their being no clause for re-entry for breach of conditions, or of the stipulations and agreements mentioned in the lease, there was no right to re-enter, and therefore ejectment would not lie.

A verdict was entered for the defendant, with leave to the plaintiffs to move to have the verdict entered in their favor.

In Easter term, *Tilt* obtained a rule *nisi* on the leave reserved.

In this term *M. C. Cameron*, Q. C., and *Read*, Q. C., shewed cause. The words here, "subject to the following stipulations," create a covenant, and not a condition. The word "stipulation" could only operate as a covenant, and the words "subject to the following stipulations," are only words of contract and not of condition; and the lease on the face of it shews that it is not intended that an assignment should vitiate the lease or cause a forfeiture. The Courts are averse to creating a forfeiture; and in the absence of express words for that purpose, they will not imply one. In *Doe dem. Henniker v. Watt*, 8 B. & C. 308, the words used were, "stipulated and conditioned;" and it was said that there might be both a covenant and a condition, "stipulated" creating a covenant, and "conditioned" a condition. In *Shaw v. Coffin*, 14 C. B. N. S. 372, where the words used were that the tenant "hereby agrees that he will not underlet the said premises without the consent in writing of the landlord," and there was no clause for re-entry, the Court held that it was not a condition, and *Doe dem. Henniker v. Watt*, is distinguished as containing the word "conditioned." In the present case

the words are no stronger than those used in *Shaw v. Coffin*, and can only mean a covenant. See also *Doe dem. Wyndham v. Crew*, 2 Q. B. 319; *Platt on Leases*, vol. ii. 324; *Cruise's Dig.* vol. ii. ch. 1, p. 1, Tit. *Estate on Condition*, vol. iv., ch. 25, p. 352, Tit. *Deed*; *Anonymous*, 2 Shower 214; 1 *Shep. Touchstone*, 121; *Taylor's L. & T.*, 5th ed., p. 298, sec. 402; *Woodfall L. & T.* 10th ed., 128-30; *Livingston v. Stickles*, 8 Paige Ch. Rep. N. Y. 398; 2 *Co. Litt.* 203 b.

J. H. Cameron, Q.C., and *Tilt*, contra. There are no cases exactly in point, but those which most resemble the present one would show that this is a condition: *Platt on Covenants*, 37, 72. No precise form of words is necessary to make either a covenant or a condition; it is sufficient if the intention can be gathered from the words used, and it makes no difference whether the words are placed before or after those upon which they are to act. The words "subject to" are said to be equivalent to *ita quod*, &c., and these words clearly make a condition. If the words had merely been "stipulated and agreed," no doubt it would only be a covenant, but the words "subject to" clearly create a condition, and this distinguishes the present case from *Shaw v. Coffin*, 14 C. B. N. S. 372, and brings it within *Doe dem. Henniker v. Watt*, 8 B. & C. 308. The clause may be construed both as a covenant and a condition. The whole instrument must be looked at and the intention of the parties gathered from it, and it appears to be that a condition was intended: 2 *Co. Litt.* 200 b; *Platt on Leases*, vol. ii. 324; *Shep. Touchstone*, 144; *Petersdorff's Abridg.* vol. vi., 35.

HAGARTY, C. J.—The lease grants a term of ten years from 1st of July, 1871. It then proceeds:—

"This lease is thus made subject to the following stipulations." Then follows a series of paragraphs numbered from one to ten.

The 8th paragraph begins: "This lease is further made in consideration of," &c., as to rent.

Paragraph 9: "It is further agreed," &c. Paragraph 10: "It is also further agreed," &c.

The argument for the plaintiffs is that the words "subject to the following stipulations," are in effect a condition forfeiting for its breach the term demised.

It is difficult to apply such a condition, if created, to some of the stipulations.

No. 1 is that the lessee shall consult the lessors before making any alterations to said buildings.

No. 2. That he shall make all alterations, additions, and repairs at his own expense.

The lessors are to be consulted; but nothing is said as to their consent being necessary.

It is not easy to see how, under No. 2, the lessee could make any alterations, or additions, except at his own expense. Literally, it would avoid a breach of condition, if the lessors were consulted, even if they objected. Nor would a proviso for re-entry be necessary to attach to clause 6, providing for the cesser of the term on destruction by fire. Nor, as to 7, for surrender at the end of the term. Nor would it be easy to apply it to No. 4, as to keeping the premises "furnished, according to law, for the security of the rent."

No. 3 and No. 5 are those chiefly requiring notice. No. 3 is, that the lessee shall pay taxes, &c.; and No. 5, on which this action is brought, that the lessee shall not assign or sub-let without consent in writing.

I have a very strong opinion that there is no provision in the lease for forfeiture for non-payment of rent, as the clause as to rent seems to be wholly a matter of contract and not of condition.

To accept the plaintiffs' argument, we must, I think, go beyond any express authority to be found in the books. It is pressed on us with much force that the case falls within the reasoning of some of the decided cases.

Doe dem. Henniker v. Watt, 8 B. & C. 308, is the most instructive of the cases. It was ejectment for a breach of a condition contained in an agreement for a lease. The words were: "And, lastly, it is stipulated and conditioned that G.

Watt," (the lessee), "shall not assign, &c." These words were held to amount to a condition.

Sir J. Bayley's judgment is very important. He points out that the agreement purported to be "in consideration of the rent and conditions thereafter mentioned." Then the words "it is stipulated" occur more than once; and then, in the last sentence, come the words: "It is lastly stipulated and conditioned that G. W. shall not assign," &c. "These words" he says "are clearly introduced into the instrument on the part of the lessor, for they are for his benefit. The word *conditioned* is fairly a word of condition. In pleading, a bond is stated to be conditioned for payment of money. It is said that the word *stipulated* and the word *conditioned*, being used together, have the same meaning, and import a covenant and not a condition; but there are several authorities which shew that if words both of covenant and condition are used in the same instrument, they both shall operate. If the word *stipulated* import a covenant, it will operate as such; and if the word *conditioned* import a condition, it must also operate."

He notices many of the authorities, and points out that a proviso, joined with words of covenant, make it a condition and a covenant also; as, for instance, provided always and it was further covenanted that the lessee should not assign. He says, "These words were held to create a condition, "because it was a general rule that where a proviso is that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it is void; but if a penalty is annexed, it is otherwise."

So, in 2 *Co. Litt.* 203 *b*, it was adjudged in similar words.

Sir J. Bayley adds, at p. 314: "The words 'provided always, *sub conditione, ita quod*,' used in a conveyance of real estate by themselves make the estate conditional. But in a lease for years no precise form of words is necessary to make it a condition. It is sufficient, if it appear that the words used were intended to have the effect of creating a condition."

It is hardly necessary to refer to the older authorities beyond what are mentioned in this case.

It must be under the very general words of Sir J. Bayley, as to the intention of the parties to be gathered from the instrument that the contention of the plaintiffs must be chiefly based.

The point is also discussed in *Platt on Leases*, vol. ii. 324. It is spoken of as "one of great nicety." Examples are given. Where the lessor covenants not to assign on pain of forfeiture of the lease, it was held to be a condition.

In *Cruise's Dig.*, vol. ii., p. 2, it is said: "A condition is a qualification or restriction annexed to a conveyance of lands, whereby it is provided, that in case a particular event does or does not happen, or in case the grantor or grantee does, or omits to do a particular act, an estate shall commence, be enlarged, or defeated."

In vol. iv., ch. 25, p. 352, *Tit. Deed*, there is a summary of the authorities as to words creating a condition. Sec. 9. says, "Conditions may be annexed to demises for years, without any of these formal words, where the apparent intent of the lessor is to make the estate conditional; although the words be not used as the words of the lessor, but as those of the lessee, or indefinitely, of neither." The example given for this is noteworthy. "Thus, if a lessee," &c., "covenants that if he shall be alien, it shall be lawful for the lessor to re-enter; it seems this is a good condition, and not a covenant only: and the lessor may take it as a covenant or condition, but not as both."

In this example there could be no doubt of the intent of the parties.

In *Petersdorff's Abridg.* vol. vi., 35 *et seq.*, the question is discussed: "It is, however, quite clear, that no express form of words are essential to the creation of the one or the other," (*sc.* covenant and condition), "although the adoption of particular terms might afford some evidence of the intention of the parties." One of the examples is, that in a lease of land, the words "paying rent" do not create a condition: *Anonymous*, 2 Shower, 214.

"A condition," says 1 *Shep. Touchstone*, 81, "is a clause of restraint in a deed; or a bridle annexed and joined to an

estate, staying and suspending the same, and making it uncertain whether it shall take effect or no."

In *Shaw v. Coffin*, 14 C. B. N. S. 372, the defendant held under a lease, which, according to the case, contained the following stipulation: "The said A. Coffin hereby agrees that he will not underlet the said premises without the consent in writing of the landlord thereof." There was no clause of re-entry. It was strongly urged that the case could not be distinguished from *Doe dem Henniker v. Watt*, 8 B. & C. 308.

Erle, C. J., says, at page 374, "The words of the instrument there were very strong—'It is stipulated and *conditioned*.' Mr. Justice Bayley never intended to say that mere words of contract like these will create a condition."

In *Hayne v. Cummings*, 16 C. B. N. S. 411, an agreement, not under seal, was made providing for a future lease to be granted on the lessee making certain repairs. It contained a proviso for re-entry for non-payment of rent, or non-observance of covenants and conditions herein contained. The repairs not being done by the agreed time, ejectment was brought, and it was objected that the terms "covenant and condition" could not apply, the instrument not being under seal. This was overruled after argument. The objections were wholly technical, as the express agreement of the parties was for re-entry, if the lessor failed to do certain things. Counsel urged, "Nor is the stipulation to do the repairs in this nature a 'condition.'" Byles, J., "Why may not 'condition' mean 'stipulation?'"

The case will not help us much, but the judgments are very instructive as to the meaning of certain terms in leases.

It is urged that we should read in the case before us the words "subject to the following stipulations," as "subject to the following conditions." I do not look upon the words as having the same import.

I have looked at several dictionaries.

Richardson gives the derivation of stipulate and stipulation as from "stipula," a straw or reed, "because in contracts or bargains respecting land the parties held a straw in

their hands, which represented the whole land," citing *Vossius* as his authority ; and as to the two words, he gives the meaning: " To contract ; to bargain ; to ask or require ; terms or conditions to covenant or agree."

He gives several examples of the use of the words. They all seem to me as indicative of a meaning equivalent to contract or bargain.

One citation from Bishop *Horsley* is significant: " Hence we may understand upon what ground and with what equity and reason salvation is promised in Scripture, to faith *without the express stipulation of any other condition.*"

Here the words are certainly used in a very different sense.

I hardly think that the somewhat fanciful origin of the word, or the alleged use of the straw in bargains about land, will much advance the argument for giving it the same meaning as condition.

Wharton's Law Lexicon, 4th ed., 893, simply calls a stipulation " a bargain," giving its derivation from " stipula," stubble left standing after the corn is reaped and carried."

The *Imperial Dictionary*, says " Stipulation " is " the act of agreeing and covenanting * * a contract or bargain." It gives it as derived from the verb " stipulor," as from " stipo " to crowd, whence the sense of agreement, binding, making fast.

We must endeavor to see what the parties really mean by the use of such a word, in a very inartificially drawn instrument.

As I read it, it is as if the landlord said, " this lease is made subject to the following covenants or agreements on on your part."

I do not feel warranted in reading it, " I make this lease on the condition that you observe the following covenants."

Nor, as already noticed, can the contracting parties have seriously understood that the breach of all the " following stipulations " should work a forfeiture of a valuable interest.

The case of *Doe dem. Henniker v. Watt*, 8 B. & C. 308, has gone, as it seems to me, to the farthest limit.

I hardly think that had the term " condition " or " con-

ditioned'' been wholly absent from the instrument, the judgment would have been in favour of forfeiture. See also *Doe dem. Willson v. Phillips*, 2 Bing. 13.

I do not lay too much stress on the doctrine often stated in the books as to our leaning against forfeiture, and that no intendment should be made in favour of forfeiture. But I do not think we should be too ready to find reasons to support a landlord's claim to re-enter as for condition broken, when he has chosen to abandon well settled forms of demise, and to omit the common well known words for creating a proviso or condition, or for providing for the avoidance of the term, if his tenant fail to perform his part of the bargain.

I must leave it to a Court of Error to decide if we are to advance a clear step beyond the latest adjudged cases, for the purpose of creating a forfeiture.

GWYNNE, J.—This lease, contrary to what may be said to be the universal practice, contains no proviso for re-entry, upon non-performance of or upon breach of any of the stipulations contained in the lease upon the part of the tenant to be performed.

The lessor then has not, in the ordinary and well understood mode in use for this purpose, expressed the intention of reserving to himself a right of re-entry in any event. Unless, therefore, this be a lease upon condition at common law, he can have no such right.

Granting what is said in *Doe dem. Henniker v. Watt*, 8 B. & C. 308, that in a lease for years no precise form of words is necessary to create a condition, and that the intention of the parties is to be regarded; when asked to construe words as making the estate conditional, which have not heretofore been recognized as having that effect at common law, we should hesitate in doing so for the purpose of causing a forfeiture.

We may, I think, fairly infer, from the absence of those terms of art which have heretofore been recognized as making an estate upon condition at common law, and of the clause in universal use for reserving by contract a right of

re-entry to a lessor, the intention of the parties to have been that the estate should not be construed to be *conditional*.

The lessor who leaves it in doubt whether or not an estate upon condition was what was intended to have been granted, cannot complain if we decline to solve a doubt of his own creation in *his* favor for the purpose of causing a forfeiture of the estate granted.

GALT, J., concurred.

Rule discharged.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
THE COURT OF COMMON PLEAS

FROM HILARY TERM, 37 VICTORIA, TO HILARY TERM, 38 VICTORIA.

ABANDONMENT.

Second distress after abandonment of first]—See LANDLORD AND TENANT, 3.

ABSCONDING DEBTORS.

Attachment — Setting aside.]—*Held*, that the absence of any express provision in C. S. U. C. ch. 25, for setting aside a writ of attachment against an absconding debtor, does not prevent the Court from doing so in the exercise of its common law power over its own process; and that such power can also be exercised by a Judge in Chambers as the delegate of the Court.—*Jackson v. Randall*, 87.

ACCEPTANCE.

Insurance—Acceptance of renewal premiums—Time elapsed.]—See INSURANCE.

By partnership, for separate debt, and not in the right name of the firm.]—See PARTNERSHIP.

Of work, where special contract not performed—Right to recover on common counts.]—See WORK AND LABOR, 3.

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ACCOUNT STATED.

See LIMITATIONS, STATUTE OF.

ACQUITTAL.

Record of—Malicious prosecution.]—*See* INDICTMENT.

ACTION.

Money had and received.]—*See* COLLATERAL SECURITY.

Trover for collaterals, where principal debt paid.]—*See* COLLATERAL SECURITY.

Right of the patentee of land to maintain trespass without entry.]—*See* CROWN LANDS.

Cause of, where arising—Division Court.]—*See* DIVISION COURTS, 2.

Work and Labor.]—*See* FRAUD AND MISREPRESENTATION.

Right of married woman to sue for wages.]—*See* MARRIED WOMAN, 1.

Defence arising after commencement of.]—*See* PLEADING.

Replevin.]—*See* REPLEVIN.

Against municipal corporations for not clearing out streams.]—*See* WATERCOURSES AND STREAMS.

AFFIDAVITS.

Sufficiency of on criminal information for libel.]—See DEFAMATION.

New trial on ground of perjury.]—See NEW TRIAL.

AGENT.

Of corporation — Appointment under by-law or resolution — Commission.]—See CONTRACT, 1—RAILWAYS, 3.

Corporation — Managing Director — Authority of.]—See CONTRACT, 1.

Foreign Company.]—See CORPORATIONS, 2.

Bribery by at Elections.]—See ELECTIONS.

See TELEGRAPH COMPANY.

AGREEMENT.

See CONTRACT.

APPEAL.

New trial on a matter of discretion — Right to appeal — Costs — C. S. U. C. ch. 13, secs. 10, 26.]—Under C. S. U. C. ch. 13, sec. 26, there is no appeal to the Court of Error and Appeal, where a new trial is granted in the Court below on a matter of discretion only; and an appeal in such case was, under sec. 10, quashed with costs.—*Hall v. Hamilton*, (in appeal). 302.

APPEARANCE.

Attorney — Unauthorized appearance]—Where a plaintiff had served only one of three defendants, who without authority directed an appearance to be entered for all three, and the plaintiffs obtained a verdict. *Held*, following *Bayley v. Buckland*, 1 Ex. 1, that the verdict must be set aside.—*Roissier v. Westbrook et al.*, 91.

ARREST.

See MALICIOUS ARREST—TRESPASS.

ARREST OF JUDGMENT.

See VENIRE DE NOVO.

ASSAULT.

Indictment for felony — Conviction for.]—See CRIMINAL LAW, 2.

ASSETS.

Necessity for, on assignment in insolvency.]—See INSOLVENCY.

ASSIGNMENT.

In insolvency — No assets — Validity of.]—See INSOLVENCY.

See CHOSE IN ACTION—COVENANT FOR TITLE—INDEMNITY—INSURANCE, 2.

ATTACHMENT.

Setting aside.]—See ABSCONDING DEBTORS.

ATTORNEY.

Unauthorized appearance by.]—See APPEARANCE.

ATTORNEY GENERAL.

Right of to grant or refuse copy of indictment.]—See INDICTMENT.

AUCTION.

Action by auctioneer — Memorandum in writing — Statute of Frauds.]—See SALE OF GOODS, 2.

BAGGAGE.

Liability of Railway Company for loss of.]—See RAILWAYS, 1.

BARRISTERS CALLED.

53, 229, 301, 499.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Notice of dishonor—Sufficiency of.*—Where a note fell due on the 25th of July, 1873, on which day it was duly presented for payment and protested, but the notice of protest, dated on the 26th, incorrectly stated that the note was this day presented and protested: *Held*, that the notice was sufficient, as it did not appear that the endorser was misled by the mistake. — *Cassidy v. Mansfield*, 383.

2. *Promissory note — Stamps*—33 Vic., ch. 13, sec. 12; 37 Vic., ch. 47, sec. 2.]—In an action on a non-negotiable promissory note made by the defendant to the plaintiff for \$4,000, dated the 7th December, 1872, it appeared that the note when made had no stamps; but that afterwards, in July, 1874, the plaintiff shewed the note to her attorney, who informed her that it should have been stamped, and told her to affix stamps for the double duty. Through some misunderstanding she affixed only single stamps; and afterwards, in September, 1874, she sent the note to the attorney, when he having discovered this, acting as plaintiff's agent, affixed the required double stamps.

Held, that the plaintiff was not a "subsequent party to the note," or a "holder without becoming a party," within 33 Vic. ch. 13, sec. 12, so as to have enabled her to have affixed the double duty, and rendered the note valid, although she might have made it valid by affixing, as agent for the maker, stamps for the single duty, when the note was delivered to her. *Escott v. Escott*, 22 C. P. 305, adhered to, and *Woolley v. Hunton*, 33 U. C. R. 152, dissented from.

Held, however, under 37 Vic. ch.

47, sec. 2, that the double stamps affixed to the note in September, after the passing of the Act, by the attorney, as plaintiff's agent, rendered the note valid, for that the plaintiff then first acquired knowledge within the Act of stamps being necessary, it being found by the learned Judge that her previous omission to affix them was through error and mistake, and without any intention on her part to violate the law.—*House v. House*, 526.

See COLLATERAL SECURITY — PARTNERSHIP.

BILL OF LADING.

Pleading—Estoppel—33 Vic. ch. 19, O.]—The plaintiff, as assignee of a bill of lading which stated that the goods were shipped in good order and well conditioned, sued for non-delivery of the goods at their destination in the like good order and condition in which they were shipped. The defendant pleaded: 1. That the goods were not in good order and well conditioned when shipped. 2. That defendant did deliver them in the like order and condition in which they were shipped. *Held*, on demurrer first plea bad, as being no answer to the breach, second plea good.

Seemle, that the Bill of Lading Act, 33 Vic. ch 19, O., creates no estoppel as to the condition in which goods are when shipped.—*Chapman v. Zealand*, 421.

BOND.

See INDEMNITY.

BONUS.

Municipal, in aid of railways.—Agent to obtain—How appointed.—See RAILWAYS, 3.

BOUNDARY.

See EJECTMENT.

BUILDING CONTRACT.

See WORK AND LABOR,

BY-LAW.

Agent of corporation—Appointment of by.]—See CONTRACT, 1.—RAILWAYS, 3.

Creating debts—Repeal of.]—See MUNICIPAL CORPORATIONS.

CANDIDATE.

Evidence of knowledge and consent of corrupt practices at elections.]—See ELECTIONS.

CARRIERS.

Liability of railway companies as.]—See RAILWAYS, 1, 6.

CAUSE OF ACTION.

In Division Court—Where arising.]—See DIVISION COURTS, 2.

CERTIFICATE.

Of payment of stock—Registration.]—See CORPORATIONS, 1, 3.

CHAMBERS.

Jurisdiction of Judge in.]—See ABSCONDING DEBTORS.

CHARITIES.

Subscriptions to by candidates at elections.]—See ELECTIONS, 2.

CHATTEL MORTGAGE.

See SALE OF GOODS, 1.

CHOSE IN ACTION.

Assignment of—35 Vic. ch. 12, O.—*Construction of—Pleading.*]—*Held*, that 35 Vic. ch. 12, O., applies to assignments made and causes of action accrued before as well as after the passing of the Act.

The declaration in this case set out a bond sued on, and also an assignment to the plaintiff, whereby L., the assignor, duly assigned and made over to plaintiff the said bond, and all his right and interest thereto or therein, and then alleged that all conditions were fulfilled, &c., to entitle the said L. until he assigned the said bond as aforesaid to plaintiff, and the plaintiff in pursuance of the statute in that behalf, and under the said assignment to him, to maintain this action. *Held*, that the declaration shewed a sufficient assignment.—*Wallace v. Gilchrist*, 40.

See COVENANT FOR TITLE—INDEMNITY.

CLEARING LAND.

In payment of rent.—See LANDLORD AND TENANT, 1.

CHURCHES.

Subscriptions to by candidates at elections.]—See ELECTIONS, 2.

COLLATERAL SECURITY.

Notes deposited as collateral security—Payment of principal note—Trover for collaterals—26 Vic. ch. 45, sec. 2—*Construction of—Money had and received.*]—Certain sale notes were deposited with defendants as collateral security for the payment of a note, endorsed by the plaintiff for the accommodation of one M., and discounted by defendants for M. The collaterals were of the

same value as the principal note, and were to be paid into the bank and applied on the note, so that when they were paid, the note also was to be paid and the plaintiff's liability to cease. After the principal note became due, defendants denied that they held the sale notes as collaterals and refused to give the plaintiff any information as to what had been paid on them; and the plaintiff then paid the note in full, and demanded an assignment of the collaterals, the plaintiff's payment being made by a part payment in cash, and his note for the balance which he paid at maturity.

Held, that the plaintiff could not maintain trover against defendants for the collaterals; for although, under 26 Vic. ch. 45, sec. 2, he was entitled to the immediate possession of them, he had not until assignment any property in them vested in him.

Semble, that the plaintiff's remedy would be by a special action on the case against defendants for not assigning the notes to him after demand duly made.

Held, however, that plaintiff was entitled to recover as money had and received to his use, the amount paid to defendants on the collaterals, and that the fact of his only paying part of the principal note in cash and giving his note for the balance did not take away his right.

Semble, also, that his right would not be affected even if the payment on the collaterals were after his payment.—*Cornish v. Niagara District Bank*, 262.

COMMISSION.

On sales—*Construction of contract for.*—See CONTRACT.

COMMON COUNTS.

Right to recover on a quantum meruit, where special contract not performed.—See WORK AND LABOR, 3.

COMPANY.

See CORPORATIONS.

CONDITION.

What amounts to in lease.—See LANDLORD AND TENANT, 6.

CONDITION PRECEDENT.

See LANDLORD AND TENANT, 2.

CONTEMPT OF COURT.

Right of Inferior Court to punish for—Power of Superior Courts.—Every Court of record has the power to punish for contempt; but if the Court is one of inferior jurisdiction, the superior Court may intervene and prevent any usurpation of jurisdiction by it.

Where, therefore, a barrister, during the sittings of the County Court of Carleton, used words which might have been, and were by the learned Judge considered to have been used to insult the Court, and on being told that unless he offered some apology he would be fined, replied that he had nothing to say; and was then adjudged guilty of contempt, and fined.—Upon motion for a *certiorari* to remove the order: *Held*, that there was no excess of jurisdiction, and that this Court could not interfere. *Ex parte Lees and the Judge of the County Court of Carleton*, 214.

CONTRACT.

1. *Commission on sales—Contract for—Construction of—Managing director—Powers of*—16 Vic. ch. 253,

secs. 10, 17, 20.—The defendants wishing to introduce an ore called blue ore into Pennsylvania, corresponded with the plaintiff at Pittsburgh. Through the plaintiff's intervention an agreement was made between O. & Co. and defendants for the sale of 15,000 tons, to be delivered before the 1st of August, 1872, with an option to O. & Co. to order any number of tons, from 10,000 to 30,000, during the five years from the 1st of February, 1873, and a formal contract was subsequently executed. On the above sale being effected, C., defendants' managing director, wrote plaintiff that a commission of 15 cents per ton would be paid him on that sale, and that he would make him the following offer for the future: "I will give you a commission of 10 cents per ton for all ore introduced to any furnace, that is, for the first sale made to any furnace; and a commission of 5 cents per ton for all blue ore for the years 1873, 4, 5, 6, 7, that is, for five years from the 1st of January, 1873; and I make you the sole agent for the sale of blue ore for Western Pennsylvania." The defendants paid plaintiff the 15 cents on the 15,000 tons; but O. & Co. having exercised their option, and ordered the 30,000 tons, plaintiff claimed that he was entitled to a commission of 5 cents per ton on this 30,000 tons, and brought this action therefor.

Held, that he could not recover, as the agreement to give 5 cents per ton on all sales during the five years, referred to future sales, and not to any amount ordered by O. & Co., under their contract.

Held, also, that proof merely that C. was defendants' managing director was not sufficient evidence, under

16 Vic. ch. 253, secs. 10, 20, of C.'s authority to enter into the contract with plaintiff; but it should have been shewn that his act was in accordance with the powers conferred on him.

Held, also, that plaintiff was not an agent within sec. 17, so as to require his appointment by by-law. —*Taylor v. Cobourg, Peterborough, and Marmora R. W. and Mining Co.*, 200.

2. *Agreement signed only by one party.*—Where an agreement contains the names of the two contracting parties, the subject matter of the contract, and the promise, it is binding on the party signing it, although not signed by the other party.

In this case the defendant entered into a written agreement, whereby in consideration of a certain salary and allowances to be paid to him by the plaintiffs, he agreed to serve them in their business as bankers for three years, and, if he should leave within that period, to pay them \$400, as liquidated damages. The agreement was signed by the defendant but not by the bank.

Held, that defendant was bound by it, and having left without excuse he was liable for the \$400.—*Bank of British North America v. Simpson*, 354.

3. *Agreement—Parol evidence to explain—"Lumber."*—In an action on the following agreement: "Due W. M. \$100, payable in lumber," &c.: *Held*, that "lumber" being the general term used for different kinds of lumber, parol evidence was admissible to shew what kind of lumber the parties intended, namely, "culls and joists."—*McAdie v. Sills*, 606.

For lease.—See LANDLORD AND TENANT, 1.

Rescission.] — See FRAUD AND MISREPRESENTATION, 1.

Married Woman — Liability.] — See MARRIED WOMAN, 2.

Building railway — Sub-contract — Construction.] — See WORK AND LABOUR, 1.

Building Contract — Joint or several — Separate contract by different tradesmen — Delay.] — See WORK AND LABOUR, 2.

Memorandum in writing — Statute of Frauds.] — See SALE OF GOODS, 2.

Special contract not performed — Acceptance of work — Right to recover on common counts.] — See WORK AND LABOUR, 2, 3.

See LANDLORD AND TENANT, 2, 3 — SALE OF LAND — TELEGRAPH COMPANY.

CONTRIBUTION.

Among wrongdoers.] — See INDEMNITY.

CONTRIBUTORY NEGLIGENCE.

See RAILWAYS, 4.

CONVEYANCE.

Under the Short Forms Act.] — See LANDLORD AND TENANT, 4.

CONVICTION.

See WAYS, 4.

CORPORATIONS.

Joint stock Co. — Liability of stockholders — Payment of stock — Registration of certificate — C. S. C. ch. 63 — Construction of.] — In an action against defendants as stockholders of a joint stock company incorporated under C. S. C. ch. 63, for debts incurred by the company to plain-

tiffs, the declaration averred that the whole amount of the capital stock had not been paid in, nor a certificate to that effect, signed and sworn to by a majority of the trustees of the company, registered in the registry office of the county, nor had the defendants paid up the full amount of their shares, nor made nor registered a certificate to that effect as required by the Act.

Held, good, for it was unnecessary to negative the registration of a certificate, under sec. 46, of the payment in full of the capital stock, and the requirements of sec. 35, which were negatived, could not be dispensed with in the case as stated in the declaration.

Quære, as to the application and meaning of sec. 46.

The defendants' first plea alleged that they were not, at the respective times when the debts were made or contracted, or at any time from thence until the commencement of this suit, stockholders in the company. *Held*, good, not being open to objection as tendering an immaterial issue, whether defendants were stockholders at the commencement of this suit, for the averment as to that could not prejudice or embarrass the plaintiff.

The replication to the first plea alleged, that although the defendants did transfer their shares to other parties, the balance due thereon had not been paid in, as required by the Act. *Held*, bad, for under secs. 29 and 30, if all previous calls had been paid, the defendants might transfer; and without such payment they could not transfer, and would remain stockholders.

The second plea alleged that within five years after incorporation defendants paid up their full shares and thereafter and before suit,

namely, 1st October, 1873, a certificate to that effect was signed and sworn to by a majority of the trustees, including the president, before the registrar, and was on the same day duly registered, as prescribed by the Act.

Held, good, without alleging that it was filed within thirty days, for that the limit, prescribed by sec. 35, applies to the general payment in full of the stock, not to payment by one individual shareholder; and that it was unnecessary to shew that defendants paid up within the time mentioned in the declaration of incorporation, or that the certificate was filed before the contracting of the debts sued for.

Under sec. 33, as soon as a shareholder has paid up his full shares, and registered the certificate prescribed, his liability ceases, except in the cases specified in the Act, and this notwithstanding sec. 34, which, owing to the manner in which the previous statutes have been consolidated, is apparently inconsistent.—*McKenzie et al. v. Kittridge et al.*, 1.

2. *Held*, that the general agent in Canada of a foreign company, must be regarded in the same light as the general agent at the head office in the foreign country.—*Campbell v. National Life Ins. Co.*, 133.

3. *C. L. P. Act, sec. 97*—*Plea of defence arising after suit.*—Under the C. L. P. Act, sec. 97, to make a plea a good plea to the further maintenance of the action, it is sufficient if it disclose on its face matter which arose after the commencement of the action; no formal commencement is necessary.

Therefore in an action by creditors against shareholders of a company, a plea setting up the payment of their shares in full by defendants, not saying before the suit, and that

a certificate to that effect was drawn up, sworn, and registered after the commencement of the suit, was held a good plea of a defence arising after suit, the defence being incomplete without the registry.—*McKenzie et al. v. Kittridge et al.*, 145.

4. *Joint stock company by letters patent—Subsequent incorporation by statute—Liability of shareholders.*—To an action for calls alleged to be due by defendant to the Canada Car and Manufacturing Company, defendant pleaded on equitable grounds, that he subscribed for the shares and became a shareholder in a company, called "The Canada Car Company," incorporated by letters patent for certain specified purposes, and not otherwise: that afterwards, and without the assent and against the will of defendant, that company applied to the Dominion Legislature and obtained an Act constituting the shareholders therein a body corporate, under the name of the Canada Car and Manufacturing Company, the now plaintiffs: that by the said Act greater powers were conferred upon the plaintiffs than were possessed by the Canada Car Company, and the nature of the business was varied and extended, and the undertaking rendered more hazardous than was contemplated by the Canada Car Company, or the defendant when he became a shareholder thereof; and that the defendant never agreed to become a shareholder of or invest his money in a company possessing the powers of the plaintiffs, whereby defendant is relieved from liability.

Held, plea clearly bad; for the Act was binding on all the shareholders, whether assenting or not to the application for it; and this Court had no jurisdiction to relieve

defendant from a liability which the statute expressly declared that he should continue to be subject to.—*Canada Car and Manufacturing Co. v. Harris*, 380.

Managing director — Whether necessary to appoint by by-law.—*See* CONTRACT, 1.

See INSURANCE, 1—RAILWAYS—SALE OF LAND—TELEGRAPH COMPANY—WAYS, 4.

CORRUPT PRACTICES.

At Elections.—*See* ELECTIONS.

COSTS.

Appeal—New trial granted as a matter of discretion.—*See* APPEAL.

Recovery of as damages.—*See* INDEMNITY.

COUNTY COURT.

Division Court judgment—Transcript of to County Court.—*See* DIVISION COURTS, 2.

See CONTEMPT OF COURT—OVERHOLDING TENANTS.

COURT.

Contempt of.—*See* CONTEMPT OF COURT.

See DIVISION COURTS.

COVENANTS.

Dependent and independent.—*See* LANDLORD AND TENANT, 2.

In lease for quiet enjoyment—Construction of.—*See* LANDLORD AND TENANT, 4.

Clause in lease—Whether covenant or condition.—*See* LANDLORD AND TENANT, 6.

COVENANT FOR TITLE.

Covenant running with the land—Equitable title—Assignment of

chose in action.—Defendant being seized in fee of certain land in trust for his son, at the request of the son, mortgaged it to B. & V. for \$400, the son receiving the money and agreeing to pay it off. Afterwards the defendant conveyed to his son, the consideration stated being \$4,000, but in reality it was a gift, and the deed by inadvertence and mistake, contained a covenant for the right to convey, notwithstanding defendant's acts, and that he had done no act to encumber the land. On the 21st October, 1866, the son mortgaged the land to the plaintiff for \$400, and this mortgage was foreclosed by the plaintiff, who was compelled to pay off the mortgage to B. & V. It did not appear that the plaintiff had any knowledge of the trust between the father and son or of the arrangement between them as to the mortgage to B. & V., or that he knew of this mortgage until after the foreclosure; but it appeared that it, together with the other conveyances, had been duly registered, and that the land was worth both the mortgages. The plaintiff having sued the defendant on the covenant contained in defendant's deed to the son, to recover the amount paid to B. & V. :

Held, affirming the judgment of the Court below, that the plaintiff could not recover, for that the facts would constitute a good defence on equitable grounds to an action brought against defendant by the son; and the title of the covenantor and covenantee being equitable only, the plaintiff, as assignee of the covenant, could stand in no better position than his assignor.—*Claxton v. Gilbert* (in appeal), 500.

See LANDLORD AND TENANT, 6.

CRIMINAL INFORMATION.

See DEFAMATION.

CRIMINAL LAW.

1. *Sending threatening letters*—32-33 Vic. ch. 21, sec. 43—*Construction of.*]—The 32-33 Vic., ch. 21, sec. 43, D., makes it a felony to send “any letter demanding of any person with menaces, and without any reasonable or probable cause,” any money, &c.

Held, that the words, “without reasonable or probable cause,” apply to the money demanded, and not to the accusation threatened to be made.—*Regina v. Mason*, 58.

2. *Indictment for shooting with intent—Conviction for assault—Evidence.*]—Upon an indictment for shooting with a felonious intent, the prisoner, if acquitted of the felony, may be convicted of common assault.

To discharge a pistol loaded with powder and wadding at a person within such a distance that he might have been hit, is an assault. It was held here that there was sufficient evidence of the prisoner having done this, and a conviction for assault was upheld.—*Regina v. Cronan*, 106.

See PERJURY.

CROSSINGS.

Railway—Locomotive blowing off steam at—Accident—Liability.]—See RAILWAYS, 4.

Railway—Improper state of—Accident—Liability.]—See RAILWAYS, 5.

CROWN LANDS.

Patentee of the Crown—Right to maintain trespass without entry.]—

The patentee of the Crown of land may maintain trespass without entry against a person in actual possession before and at the time of the issuing of the patent, for the letters patent operate by way of feoffment with livery of seizin to the patentee, and defendant's possession must be regarded as an entry subsequent thereto.—*Greenlaw v. Fraser*, 230.

DAMAGES.

Unliquidated.]—See FRAUD AND MISREPRESENTATION.

Recovery of costs as.]—See INDEMNITY.

For illegal distress.]—See LANDLORD AND TENANT, 5.

Nominal.]—See SALE OF LAND.

DEBTS.

Repeal of by-law creating.]—See MUNICIPAL CORPORATIONS.

DECEIT.

See FRAUD AND MISREPRESENTATION.

DEDICATION.

See WAYS, 2, 3.

DEED.

Lease—Short Forms' Acts.]—See LANDLORD AND TENANT, 4.

DEFAMATION.

Libel—Criminal information—Affidavits—Sufficiency of.]—On an application for a criminal information against defendants for a libel, the applicant's affidavit stated that he had read an article published in the *National* newspaper in Toronto, on the 16th of July, 1874, setting

it out: that he was the person referred to: that the statements therein were untrue; and that they were intended to prejudice and injure him: that the defendants were, on the 16th of July, proprietors and publishers of said paper; and that the article was printed and published by them, and is the same article contained in the said newspaper, attached to the affidavit of R., "filed on this application." R.'s affidavit was sworn on the 22nd of August, and stated that the annexed copy of the *National* newspaper, bearing date the 16th July, 1874, was on that day published in Toronto, at 21 Adelaide Street East," by defendants, "who are the publishers and proprietors thereof." The newspaper contained the libel set out in the applicant's affidavit. The application was not made until the 24th of August, two days after the affidavit was sworn.

Held, that the applicant's affidavit was sufficient: that the reference to R.'s affidavit as "filed on this application" could only mean, there being only one application, the application about to be made on these affidavits.

Held, also, that it was no objection that the rule *nisi* was stated to have been moved by counsel for the Crown, instead of for the applicant.

Held, also, that it was no objection that the affidavit described the applicant as "Esquire" only, for it was not necessary to shew that he occupied any public or official position.

In answer to the application the defendants filed an affidavit stating that they had no personal knowledge of the matter contained in the alleged libels, but received the

information from persons whom they believed to be reliable and trustworthy: that the *Globe* newspaper was controlled by the applicant, who was an active politician, and had published a number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true and without malice. *Held*—No answer.—*Regina v. Thompson et al.*, 252.

DELAY.

See *INSOLVENCY—WORK AND LABOUR*, 2.

DEPARTURE.

In pleading.]—See *INSURANCE*, 2
—*LANDLORD AND TENANT*, 2.

DESCRIPTION OF LAND.

See *EJECTMENT*.

DISCHARGE.

Insolvency—Waiver of objections—Validity.]—See *INSOLVENCY*.

DISTRESS.

Illegal.]—See *INDEMNITY*.

Goods left to be repaired—Exemption.]—See *LANDLORD AND TENANT*, 3.

Illegal—Damages.]—See *LANDLORD AND TENANT*, 3.

Second distress for same rent.]—See *LANDLORD AND TENANT*, 5.

See *TENDER*.

DIVISION COURTS.

1. *Division Court jurisdiction—Cause of action—C. S. U. C. ch. 19, sec. 71.*]—"Cause of action,"

within the Division Court Act, C. S. U. C. ch. 19, sec 71, means the "whole cause of action;" and therefore where the plaintiffs sued defendant in the Division Court, at Ingersoll, in the County of Oxford, on a promissory note, payable there, but made in Strathroy, in the County of Middlesex, where defendant resided: *Held*, that as the whole cause of action did not arise at Ingersoll, the action would not lie there, but should have been brought at Strathroy, where defendant resided; and that a prohibition was properly ordered.

Vaughan v. Weldon, L. R. 10 C. P. 47, and the cases on the C. L. P. Act, sec. 44, distinguished.—*Noxon et al. v. Holmes et al.*, 541.

2. *Division Court judgment—Transcript to County Court.*]—*Held* that, under the Division Courts Act, C. S. U. C. ch. 19, secs. 142, 143, 145, an execution against goods and chattels must first issue out of the Division Court in which judgment was originally recovered, and be returned *nulla bona*, before a transcript of the judgment can be transmitted to and filed in a County Court.

Where, therefore, without the issue of such execution and its return *nulla bona*, a transcript was filed in the County Court, under which plaintiff's lands were seized by the sheriff and sold: *Held*, that the sale was void. — *Burgess v. Tully et al.*, 549.

EASEMENT.

Stove-pipe passing through adjoining house—Evidence.]—The owner of a house subdivided it, and let the north part to one G. This consisted of two rooms, a front and back room, the front room having a

chimney, but not the latter. G. had a stove in the back room, and the only way he could use it was by passing a stovepipe through a hole in the partition between his and the south part, and thence into the chimney in that part. The owner subsequently leased the south part to defendant, who at the time he became tenant was aware of the existence of the stovepipe. G. afterwards assigned to the plaintiff, and on leaving took down the pipe. The plaintiff, on coming in, put up a pipe of his own, with the consent of, or at least, without any objection by defendant. The defendant having afterwards taken down the pipe and stopped up the hole:

Held, that he was a wrong-doer in so doing, for that he only held the south part subject to the user or easement of the plaintiff of the stovepipe and hole.—*Culverwell v. Lockington*, 611.

EJECTMENT.

Question of boundary—Description of land.]—The plaintiff in ejectment described the land claimed by him as that part of lot 24 comprised within these limits: commencing at the south westerly corner of lot 24, then north, parallel with town line, 20 feet; then easterly parallel with the southerly limit of said lot to town line, then southerly along said line to the southerly limit of said lot 24, then westerly along said southerly limit to the place of beginning. Defendant appeared and limited his defence to the land described as, commencing at the north easterly corner of lot 25; thence southerly along the said easterly boundary of said lot, 20 feet to a point; thence westerly, at right angles to said

boundary, to a point on the western boundary of said lot 25; thence northerly along said boundary 20 feet to a point on the boundary line between lots 24 and 25; thence easterly along said last mentioned boundary line to the place of beginning; "and which is sought to be recovered in this action as being part of lot 24." Lot 24 adjoined and lay to the north of lot 25. It was admitted at the trial that the plaintiff was entitled to the south half of 24 and defendant to the north half of 25, and the learned Judge thereupon held that there was nothing to try, and entered a verdict for the plaintiff; but

Held, that the question of the true position of the boundary line between the lots was substantially raised, and should have been tried. — *Archer v. Kilton*, 195.

See OVERHOLDING TENANTS.

ELECTIONS.

1. *Parliamentary election*—*Corrupt practices at*—*Evidence of the candidate's knowledge and consent.*] — In an election case, on appeal from the judgment of the presiding judge at the trial—*Held*, that the circumstantial evidence, as set out in the report, was sufficient to shew that corrupt practices were committed by the agents of the respondent, and with his knowledge and consent, notwithstanding his disclaimer on oath. It is sufficient to shew the candidate's knowledge of and assent to the fact that his agents were using bribery to procure his election, without connecting him with any particular act of bribery; and his assent must be assumed from his non-interference or objection when he has the opportunity. *Semble*, that wilful intentional

ignorance is the same as actual knowledge.—*The London Election Case*, 434.

2. *Corrupt practices at elections*—*Subscriptions to churches.*] — The learned Judge who tried an election case, having set aside the election for bribery by agents, but found that the candidate was not himself guilty of corrupt practices, the Court, on appeal, declined, under the evidence set out in the case, to interfere; but the appeal was dismissed without costs, as there were strong grounds for presenting it; and had the finding been otherwise it would not have been disturbed.

Remarks as to subscriptions to churches and charities given a short time before the election.—*The South Huron Election Case*, 488.

ENTRY.

Right of patentee to maintain trespass before.]—See CROWN LANDS.

Right of.]—See LANDLORD AND TENANT, 6.

EQUITABLE PLEADING.

See FRAUD AND MISREPRESENTATION, 1—INSURANCE, 2.

EQUITABLE TITLE.

See COVENANT FOR TITLE.

ERROR AND APPEAL.

See APPEAL.

ESQUIRE.

Description of applicant in criminal information.]—See DEFAMATION.

ESTOPPEL.

See BILL OF LADING—INSOLVENCY—INSURANCE.

EVICTIION.

See LANDLORD AND TENANT, 1.

EVIDENCE.

See CONTRACT, 3 — CRIMINAL LAW, 2—EASEMENT—ELECTIONS—FRAUD AND MISREPRESENTATION, 2 —LIMITATIONS, STATUTE OF—MALICIOUS ARREST — MARRIED WOMAN, 1—RAILWAYS, 1, 2, 3, 5, 6—REPLEVIN—TENDER — TRESPASS—WAYS, 1, 2, 3—WORK AND LABOUR, 3.

EXECUTION.

In County Court on transcript of Division Court judgment.]—See DIVISION COURTS, 2.

Setting aside fi. fa. after discharge in insolvency.]—See INSOLVENCY.

EXEMPLIFICATION.

Of foreign judgment—Sufficiency of.]—See FOREIGN JUDGMENT.

FALSE REPRESENTATION.

See FRAUD AND MISREPRESENTATION.

FEOFFMENT.

See CROWN LANDS.

FI. FA. GOODS.

Setting aside after discharge in insolvency.]—See INSOLVENCY.

FI. FA. LANDS.

See DIVISION COURTS.

FIRE.

Setting out on land.]—See RAILWAYS, 2.

Stovepipe passing through adjoin-

ing house—Right to as an easement.]—See EASEMENT.

FIREARMS.

Discharging.]—See CRIMINAL LAW, 2.

FIRE INSURANCE.

See INSURANCE, 2.

FOREIGN COMPANY.

Agents of in Canada—Power to bind company.]—See CORPORATIONS, 2.

FOREIGN JUDGMENT.

*Proof of — Personal service — Waiver of.]—To prove a judgment recovered in Lower Canada an instrument was produced, headed, "Province of Quebec, District of Montreal, Superior Court of Lower Canada," and setting out the judgment of the Court, and certified to be a true copy under the hand of the prothonotary and the seal of the Court: *Held*, sufficient, under C. S. C. ch. 80, sec. 1.*

It was also objected that the judgment was not sufficient, as the defendant had not been personally served with process in the action in the foreign Court; but Held, that as defendant had procured bail to be put in, and so obtained his freight, which had been attached, the objection could not be raised—Tilton v. McKay, 94.

FORFEITURE.

Of policy of insurance—Non-payment of renewal premiums within stipulated time—Waiver.]—See INSURANCE, 1.

Of lease.]—See LANDLORD AND TENANT, 6.

FORMS.

Statutory lease—Compliance with forms.]—See LANDLORD AND TENANT, 4.

FRAUD AND MISREPRESENTATION.

1. *Action for work and labour—Fraudulent representations—Equitable plea—Claim for unliquidated damages.*]—Action on the common counts for work and labour in cutting and sawing timber for defendants. Plea, on equitable grounds, in substance, that the plaintiff falsely and fraudulently represented to the defendants that he had certain interests in and the title to certain lands, and certain interests in and the right to cut timber on other lands, whereby defendants were induced to purchase the said interests, &c., paying a certain sum down, and securing the rest by mortgage; and it was further agreed that the plaintiff should cut and saw into lumber all the saw logs on said lands first mentioned for the defendants: that defendants, relying on plaintiff's representations, entered upon said lands and cut and made timber on said lands secondly above mentioned, and expended a large sum of money therein; yet that the plaintiff had not the right in respect of a large quantity of the said secondly above mentioned lands, by reason whereof defendants acquired rights of much less value than the plaintiff represented he possessed, namely, by a sum exceeding the plaintiff's claim; and defendants first became aware of the said false and fraudulent representation after they had purchased said lands, cut the timber, and expended the moneys as aforesaid,

and defendants are likely to lose a large quantity of the said timber and sawlogs so cut and made by them as aforesaid: that the plaintiff's cause of action arose in cutting and sawing into lumber, under said agreement, the sawlogs upon the said first above mentioned lands, and otherwise in part performance of this agreement. And defendants prayed that it might be declared that they were not liable to pay anything to the plaintiff, and that the plaintiff might be ordered to pay defendants what is just and equitable for the loss they have sustained.

Held, plea bad, as constituting no defence, but only amounting to a claim for unliquidated damages, the subject of an action at law and not of a suit in equity.

Held, also, that no ground was shewn for the rescission of the contract, and an amendment, by adding a prayer therefor, was refused.

Quære, as to defendants' right to claim a rescission of the contract.—*Lapp v. Firstbrook et al.*, 239.

2. *False Representation—Warranty—Evidence.*]—The plaintiff purchased a steam vessel from defendant on the faith, as he alleged, but which defendant denied. of certain representations made by defendant as to her power and capability; and, after some discussion, a document called a bill of sale, but not under seal, the vessel being unregistered, was executed. This merely stated that the defendant, in consideration of \$3,000, sold and assigned the vessel to plaintiff, with a warranty only as to title. The boat did not answer the alleged representations as to power and capability, but no fraud was charged against defendant. The plaintiff having brought an

action for a false representation, and also for breach of warranty:

Held, that the plaintiff could not recover as for a false representation, there being no imputation of fraud; that his remedy, if at all, must be for breach of warranty; and that although the document contained only a warranty as to title, still it was a question for the jury upon the whole evidence whether the defendant had in fact intended to warrant her power and capability, or whether the document contained the whole contract.—*Bennett v. Tregent*, 565.

FRAUDS, STATUTE OF.

Agreement signed only by party to be charged—Sufficiency of.—See CONTRACT, 2.

Sale of goods at auction—Memorandum in writing.—See SALE OF GOODS, 2.

FURTHER INSURANCE.

See INSURANCE, 2.

HEALTH.

Proviso as to health of insured in policy.—See INSURANCE, 1.

HIGHWAYS.

See RAILWAYS, 4, 5—WAYS.

HIRING.

See CONTRACT, 2.

HOUSE.

Stove-pipe from adjoining, passing through.—See EASEMENT.

HUSBAND AND WIFE.

See MARRIED WOMAN.

IDENTITY.

Evidence of identity of timber cut on limits by wrongdoer.—See REPLEVIN.

IGNORANCE.

Wilful, same as actual knowledge.—See ELECTIONS, 1.

INDEMNITY.

Bond—Pleading—Landlord and tenant—Distress warrant—Illegal seizure—Contribution among wrongdoers.—Defendant was a creditor of one T. H., and at defendant's request one L., on receiving the bond the subject of this suit, executed a power of attorney to defendant to collect certain rent due by T. H. to L. Defendant then requested L. to sign a distress warrant against T. H., which L. did, and defendant placed it in plaintiff's hands with instructions to seize certain property which defendant had caused to be placed on the demised premises, as well as some other property elsewhere. The plaintiff seized, and shortly afterwards obtained a bond of indemnity from L. The property was claimed by J. H. a son of T., H., but was sold by defendant's instructions, who became the purchaser of a large portion. J. H. brought an action against L. and the plaintiff, and recovered against them. Plaintiff paid the damages and costs, and commenced an action against L. on his bond. This L. settled by conveying to plaintiff a lot of land and assigning to plaintiff by deed defendant's bond, and plaintiff then sued defendant on this bond. The declaration set out the bond, and also the assignment to plaintiff, whereby L.

duly assigned and made over to plaintiff the said bond and all his right and interest thereto or therein, and then alleged that all conditions were fulfilled, &c., to entitle the said L., until he assigned the said bond as aforesaid to plaintiff, and the plaintiff in pursuance of the statute in that behalf, and under the said assignment to him, to maintain this action.

Held, that the defendant was liable, for although the distress warrant was executed by L., yet it was done at defendant's request, who assumed the entire direction of the seizure and sale.

Held, also, that L. was damnedified, in having to settle the plaintiff's action against him by conveying the land and assigning the defendant's bond; and that he was not bound to defend the suit, for the plaintiff having acted under express instructions from defendant, L.'s agent, and having been guilty of no wilful neglect or default, L. had no defence.

Held, also, as the plaintiff's act in seizing and selling was done under defendant's direction, and in good faith, and was not apparently illegal in itself, the rule of no contribution among wrong-doers did not apply.

Held, also, that J. H. had a right of action against plaintiff and L., and it mattered not whether T. H. or J. H. was injured, so long as the plaintiff acted under the warrant, and was in consequence made responsible.

Held, also, that the plaintiff was entitled to recover the costs of defence incurred by him and L.—*Wallace v. Gilchrist*, 40.

INDICTMENT.

Malicious prosecution—Record of acquittal—How obtained.—*Seemle*, that a person tried for felony and acquitted can only obtain a copy of the indictment and record of acquittal, to be used in action for malicious prosecution, on the fiat of the Attorney-General; and the granting or refusing such application cannot be reviewed by this Court.

The application here was for a rule calling on the Attorney-General to shew cause why judgment of acquittal should not be entered on the indictment.

Held, that the indictment not being a record of this Court, or brought into it by *certiorari*, the Court had no jurisdiction.—*Regina v. Ivy*, 78.

See CRIMINAL LAW—PERJURY.

INSOLVENCY.

Discharge—Waiver of objections thereto—Right to assign when no assets.—Some nine years after defendant had obtained his discharge in insolvency, the plaintiff, a scheduled creditor, issued a *fi. fa.* against defendant's goods on a judgment recovered before the discharge, contending that the discharge was void, because defendant had, previous to his assignment, fraudulently allowed a judgment to be recovered against him and his assets taken; and, also, because his assets being so taken, there was nothing at the time of the assignment on which it could operate. It appeared, however, that the plaintiff consented to the assignment, and did not appeal from the order of discharge; nor did he, when the discharge was

being granted, raise the objection of no assets.

Held, that the *fi fa*. goods must be set aside; and that the plaintiff's remedy, if any, was by action on the judgment.

Semble, however, that the plaintiff, by his conduct and the lapse of time, was precluded.—*Parke v. Day*, 619.

See INSURANCE, 2 — LANDLORD AND TENANT, 3.

INSURABLE INTEREST.

See INSURANCE, 2.

INSURANCE.

1. *Insurance Company — Acceptance of premiums after time elapsed — Proviso as to insured being in good health — Meaning of.*]—By the non-payment of the renewal premiums at the stipulated times, a policy of life insurance became forfeited. The policy provided that payment if made when over due, would not be considered as continuing the policy unless the insured was in good health at the time; but the practice of the company was to receive payment of such premiums, and to issue the renewal receipts within thirty days after the stipulated times, provided the insured were then in good health. *Held*, that the proviso as to the insured being in good health did not apply to his actual state, but to the general understanding of the parties and their consequent action thereon.

Where, therefore, at the time of paying the premium and giving the receipt, the insured had in fact received an injury which soon after resulted in death; but it clearly appeared that no danger was anticipated by either the insured

or his medical attendant, or by the defendants themselves: *Held*, that the payment was good, and the forfeiture waived.

Held, also, that the proviso as to the insured being in good health, was to guard against frauds committed on the company, and not to prevent the company themselves, when in full possession of the facts, dealing with the insured.

Held also, that the general agents in Canada of a foreign company, must be regarded in the same light as the general agents at the head office in the foreign country.—*M. A. Campbell v. National Life Ins. Co.*, 133.

2. *Insolvency — Further insurance — Change of occupation — Renewal — Fleeing — Departure.*]—Declaration.—First count: On a fire policy, dated 22nd September, 1869, made by defendants to one B., for one year, with condition for renewal; alleging that B. renewed to 22nd September, 1873; that prior to 25th January, 1872, he became insolvent, &c., and that the plaintiff was his assignee, and at the time of loss was solely interested; that the premises were destroyed by fire on the 13th of March, 1873, whereby the plaintiff, as assignee, became entitled to recover the insurance from defendants: breach, non-payment. Second count: setting out apparently the same policy, &c., as in the first count, averring an insurance to B. and renewals by him, and loss by fire on the 14th March, 1873, whereby B. became solely interested; and that after the fire and before suit, namely, on the 5th of November, 1872, B. by writing assigned to plaintiff, as assignee in insolvency, all his interest in said insurance, &c.

Second plea: that by one of the conditions, the renewal policies became avoided if insured, or his assigns, should effect any further insurance, and should not with reasonable diligence notify the company, and have it endorsed; that the plaintiff became assignee before the fire of B.'s estate and effects, including this property and policy; and then effected a further insurance in the Western Assurance Company; and that neither he nor B. gave notice, &c., whereby the policy was avoided. *Held*, plea good, for the plaintiff was B.'s assignee within the policy, and as such became possessed of B.'s policy for the benefit of the estate, and in such interest effected the second insurance.

An equitable replication to this plea alleged that when the plaintiff effected the further insurance, he was ignorant of this insurance by B.; that, as soon as he became aware thereof, he, with all reasonable diligence, notified defendants, and by their default it had not been endorsed. *Held*, bad, for the assignee's ignorance could not deprive defendants of the benefit of their express stipulation.

A further replication alleged that defendants with full notice of B.'s insolvency, and plaintiff becoming assignee, accepted from B. the renewal premium, and renewed the policy to him and for his benefit, from September, 1872, to September, 1873; that the subsequent insurance was for the plaintiff's benefit as assignee, and that B. had an insurable interest in the property greater than the sum insured with defendants, as they knew. *Held*, bad, for it shewed no new contract released from the stipulation relied on in the plea.

Third plea: that before the loss, the plaintiff became the assignee, and the policies and insured property became absolutely transferred and vested in him; and he became and was the insured under the policy, and the person sustaining damage, but he did not give notice of the loss, &c. *Held*, plea bad.

Equitable replication: that before the loss, the property was not absolutely vested, &c., in plaintiff, but B. still had an insurable interest therein to the property to the amount of the policy, which defendants knew, and they renewed the policy to him for value for a year, during which the loss occurred; and B., who was the person sustaining loss, &c., gave the notice and proofs. *Held*, bad, for it was a departure from the first count of the declaration, which averred a sole interest in the plaintiff; and that B. had no insurable interest apart from the plaintiff.

Fourth plea: that by one of the conditions, defendants were to be notified of all changes of occupation, or of vacancy; that at the time of insurance, the premises were vacant, and afterwards they were occupied by B., in part as a dwelling house, and in part as an Orange lodge; and defendants were not notified.

Equitable replication: that when the policy was made, defendants knew that the building was in course of construction, and that B. intended to occupy it as a dwelling; and that afterwards, with such knowledge, B. occupied, as "in the fourth plea alleged;" and defendants, with knowledge thereof, received the renewal premiums down to the time of the loss without objection, *Held*, replication

good, and that it sufficiently shewed notice to defendants of the occupation as a lodge.

Sixth plea: averring B.'s insolvency and assignment to plaintiff on the 25th January, 1872, and and that the current year expired in September, 1873, and that the plaintiff did not renew by paying the premiums, &c., and so that policy was at an end. Equitable replication: that the defendants should not be allowed to so aver, because B., under whom plaintiff claims, duly paid up renewal premiums to defendants, who accepted, and gave their receipts therefor, declaring policy renewed, &c., which receipt B. delivered to plaintiff, who adopted his act.

Held, replication good for B.'s payment in renewal, and taking the receipts in his own name, would enure to the benefit of the estate.—*Dickson v. Provincial Ins. Co.*, 157.

JOINT STOCK COMPANY.

Road constructed by—Right of municipality to remove obstructions upon.—See *WAYS*, 4.

See *CORPORATIONS*, *1, 3, 4.—*SALE OF LAND*.

JUDGE IN CHAMBERS.

Jurisdiction of.—See *ABSCONDING DEBTORS*.

JUDGES.

Appointment of, 33.

JUDGMENT.

Arrest of.—See *VENIRE DE NOVO*.

In Division Court—Transcript to County Court.—See *DIVISION COURTS*, 2.

See *FOREIGN JUDGMENT*.

JURISDICTION.

Of Judge in Chambers.—See *ABSCONDING DEBTORS*.

Of Division Court—Cause of action—Where arising.—See *DIVISION COURTS*, 1.

Of C. C. Judge in cases of overholding tenants.—See *OVERHOLDING TENANTS*.

KNOWLEDGE AND CONSENT.

Evidence of by candidate, of corrupt practices at elections.—See *ELECTIONS*.

LAND.

Description of—Questiary.—See *EJECTMENT*.

LANDLORD AND TENANT.

1. *Contract for lease—Rent to be paid by clearing—Eviction—Right to recover for work done.*—Where, under a parol agreement for a lease made between defendant and plaintiff for ten years, on the terms of the plaintiff clearing or paying a rental either in clearing or in money, the plaintiff entered into possession and after clearing a certain number of acres, the defendant sold the lot, and the purchaser ejected the plaintiff: *Held*, that the plaintiff could not recover under the agreement, not being in writing; nor under the common counts for the value of his services, for the clearing of the land, was not the primary service for which the lease was, after the performance of the work, to be given as a mode of compensation; but the lease was the primary thing contracted for, and the work was reserved as a rent from year to year.

Semble, that the plaintiff's remedy if any, was for specific performance of the agreement against the purchaser, who had purchased with notice of the plaintiff being in possession.

Semble, per HAGARTY, C. J., that if the bargain had been for work to be done by plaintiff in clearing the land, to be paid for by allowing him to occupy, and defendant had prevented the occupation, the plaintiff might have recovered the value of the work.—*Draper v. Holborn*, 122.

2. *Dependent and independent covenants — Pleading — Insufficient statement of breach—Departure.*—Declaration on an agreement, whereby defendant agreed to give and plaintiff to take a lease of an hotel in Toronto in the occupation of the defendant, for ten years, from the 29th September, 1873, when possession was to be given; that defendant's license to sell liquors in the hotel was to be transferred at or before possession was given to plaintiff, who was to pay a proportionate part of the cost thereof for the unexpired part of the year; and that all the furniture then in use in the hotel, and the stock of liquors, &c., were to be taken at a valuation, including the omnibus, &c., as well as certain other articles mentioned. The valuation to commence and be finished on or before the 29th September instant, a lease containing the usual covenants to be prepared and executed by both parties; and that for the due performance of the agreement the parties became bound to each other in \$1000, to be paid by the party in default, as liquidated damages.

The third and fourth counts, after setting out the agreement, averred that all conditions were fulfilled,

(except the tender of the lease, which defendant waived by preparing a lease and tendering it to plaintiff for execution, and except the valuation of the furniture and stock of liquors, &c., which defendant hindered and prevented of his own wrong); and that all things happened, &c., to entitle plaintiff to have said agreement performed, and the premises let to him as aforesaid; and the plaintiff has always been ready and willing to perform and has performed his part of the said agreement, yet the defendant did not perform said agreement, nor (as stated in the third count) pay the \$1000, nor (as stated in fourth count) let plaintiff into possession.

Held, both counts bad, for among other reasons no breach was specifically alleged; and it appeared that defendant tendered a lease for execution, to which no objection appeared, so that the plaintiff was in default in not executing it.

Fifth plea: that the valuation of the furniture, &c., was not finished on or before the 29th of September, nor yet finished. To which the plaintiff replied that the valuation was prevented and not finished on or before, &c., solely by the acts and misconduct of the defendant.

Held, plea good, as the valuation was a condition precedent to the granting of the lease; and replication bad, as a departure from the declaration.

Sixth plea: that the plaintiff did not tender to the defendant any lease for execution, &c.

Held, bad, as this was not incumbent on the plaintiff, for by the agreement defendant was to give a lease.

Sixth plea: that the plaintiff did not execute the lease when tendered

him by defendant. Replication: that the plaintiff was ready and willing to execute the lease when tendered, but was prevented by the acts and misconduct of defendant, &c.

Held, bad, for not shewing how defendant's acts and misconduct hindered and prevented plaintiff executing a lease expressly tendered to him for execution.—*Walker v. Kelly*, 174.

3. *Second distress for same rent—Goods delivered to be repaired—Construction of agreement.*]—D. was tenant to M. under a lease, which provided that in the event of D. making an assignment in insolvency the term should become forfeited and void, but that the then current quarter's rent, as well as the next succeeding current quarter's rent, should immediately become due and payable. On the 21st June, 1872, D. made an assignment in insolvency to K., an official assignee; and M. immediately distrained for the rent, including two quarters due by virtue of the forfeiture. At the request of the official assignee, M. abandoned the distress, and in lieu thereof agreed to look to the insolvent estate, the assignee thinking that there would be abundance of property to pay it, but repudiating any interest in the term. Subsequently, the goods proving insufficient, by reason of a chattel mortgage, the assignee told M. that he could not continue responsible, and M. thereupon, on the 24th September, issued a second distress for same rent.

Held, that the second distress was bad, for on the abandonment of the first distress, which could not be said to have been at the request of the tenant, M.'s right to distrain was gone, and he could only look

to the insolvent's goods, which passed, without the term, to the assignee.

Held, also, that the second distress could not be supported under the statute of Anne, as having been made within six months after the determination of the term.

An engine and boiler were left with D. by the plaintiff to be repaired, the repairs to be made in consideration of the use of the engine and boiler while in his possession. If a sale should be made within six months, D. to pay plaintiff \$400, and retain anything over as his commission. If not sold in six months plaintiff to be at liberty to retain the goods, D. to leave the same in repair, without charge, and to pay nothing for their use. *Held*, that D. acquired no beneficial interest until the repairs were made.—*May v. Severs et al.*, 396.

4. *Lease—Statutory form—Compliance with—Covenant for quiet enjoyment—Demise—C. S. U. C., ch. 92—14 & 15 Vic., ch. 8—Construction of.*]—A lease made in 1870, purported to be made "in pursuance of the Act to facilitate the leasing of lands and tenements," being the title of the 14 & 15 Vic., ch. 8, consolidated in ch. 92, Con. Stat. U. C., instead of "in pursuance of an Act respecting short forms of leases," which is the title of the consolidated Act.

Held, nevertheless, a sufficient reference to the consolidated Act, so as to bring the lease within its provisions.

Where, therefore, the plaintiff (the lessee) was evicted by title paramount to the lessor: *Held*, that he could not recover as for a breach of the covenant for quiet enjoyment, which is limited by the statute to the acts of the lessor and those

claiming under him, nor under an implied covenant contained in the word "demise," as it is controlled by the express covenant for quiet enjoyment.—*Davis v. Pitchers*, 516.

5. *Illegal distress—Damages.*]—Where a tenant, to relieve his goods from illegal distress, pays the amount of the distress and recovers his goods: *Semble*, that in an action of trespass for the wrongful seizure, he is not entitled to recover as damages at least the value of the goods.—*Matheson v. Kelly*, 598.

6. *Lease—Construction of—Condition or covenant—Right of entry.*]—In a lease there was no express proviso for re-entry, but the lease was stated to be made "subject to the following stipulations." Then followed a number of clauses, one of which was that the lessee should not assign the lease without the consent in writing of the lessor:—*Held*, that the words "subject," &c., had not the effect of making the succeeding clauses conditions, so as to cause a forfeiture and right of entry for their breach; and therefore that ejectment would not lie for assigning the lease without the consent of the lessor.—*McIntosh et al. v. Samo*, 625.

See INDEMNITY — OVERHOLDING TENANTS — TENDER.

LEASE.

See LANDLORD AND TENANT.

LETTERS.

Sending threatening letters to extort money.]—See CRIMINAL LAW, 1.

LIBEL.

See DEFAMATION.

LIFE INSURANCE.

See INSURANCE.

LIMITATIONS, STATUTE OF.

Account stated—Evidence of.]—In an action on a note for \$4000, made by defendant, payable to plaintiff, it was proved that, in 1872, when the note was given, an account was stated between plaintiff and defendant, the sum found due being \$4,000, the amount of the note, which was made up of the principal sums advanced from time to time, and of the interest on those sums, which it was then agreed should be converted into principal. *Held*, sufficient to take the case out of the Statute of Limitations.

Held, also, however, that the statute never applied at all, as it was proved that in 1866, before the lapse of six years, the plaintiff and defendant met together and stated an account in writing, at \$1,923; and that when the second accounting took place in 1872, being within six years of the former accounting, it was agreed that in the new account the former account should constitute an item, the written acknowledgment of which was given up to the defendant and burned.—*House v. House*, 526.

LIQUIDATED DAMAGES.

Penalty or liquidated damages.]—The defendant entered into a written agreement, whereby, in consideration of a certain salary and allowances to be paid to him by the plaintiffs, he agreed to serve them in their business as bankers for three years, and if he should leave within that period to pay

them \$400, as liquidated damages, *Held*, that the \$400 was recoverable as liquidated damages, and not as a penalty.—*Bank of British North America v. Simpson*, 354.

LIVERY OF SEIZIN.

See CROWN LANDS.

LUGGAGE.

Liability of Railway Company for conveyance of]—See RAILWAYS, 1.

LUMBER.

Meaning of—Admissibility of parol evidence to explain.]—See CONTRACT, 3.

MALICIOUS ARREST.

Pleading.—A declaration for malicious arrest, averred that the defendant charged the plaintiff with having caused the death of S. by administering a poisonous drug, and, upon such charge, procured a warrant for plaintiff's apprehension; and the charge in the information was to the same effect,

Held, bad, as disclosing no valid cause of action, for no felony was charged, and the administration of the drug might have been either accidental or as a medicine, so that there was nothing on which to found the magistrate's jurisdiction.—*Stephens v. Stephens*, 424.

See TRESPASS.

MALICIOUS PROSECUTION.

Record of acquittal to be used in—How obtained.]—See INDICTMENT.

MANAGING DIRECTOR.

Of corporation—Powers of.]—See CONTRACT, 1.

MARRIED WOMAN.

1. *Right to recover wages*—35 Vic. ch. 16, O.]—*Held*, that under 35 Vic. ch. 16, sec. 1, O., a married woman can maintain an action for her wages, earned whilst living with her husband, who as agent of the defendants employed her; and that her husband is a competent witness in her behalf.—*McCandy v. Tuer et al.*, 101.

2. *Liability of*—35 Vic. ch. 16, O.]—Under 35 Vic. ch. 16, O., a married woman is liable only upon contracts entered into on the credit of her separate estate.

The real estate of a woman married before 1859, not settled by any marriage settlement or deed, is not her separate estate; and sec. 1 of 35 Vic., ch. 16, which applies only to marriages after that Act, does not make it so.

Where the plaintiffs furnished goods for such a married woman, having such real estate, upon the strength of her having it, and took her bond, without the consent or concurrence of her husband: *Held*, that she was not liable upon it, under 35 Vic. ch. 16, during her husband's lifetime.—*McCready v. Higgins*, 233.

MASTER AND SERVANT.

See CONTRACT, 2.

MEMORANDA.

53, 229, 301, 499.

MESSAGE.

By telegraph—Negligence in transmitting—Liability.]—See TELEGRAPH COMPANY.

MINERAL RIGHTS.

Sale of in road allowance—Municipal Act, secs. 441, 442.]—See SALE OF LAND.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

MONEY.

Sending threatening letters to extort.]—See CRIMINAL LAW, 1.

MONEY HAD AND RECEIVED.

See COLLATERAL SECURITY.

MORTGAGE.

See SALE OF GOODS.

MUNICIPAL AID.

To Railways—Agent to obtain—How appointed.]—See RAILWAYS, 3.

MUNICIPAL CORPORATIONS.

By-law creating debt—Repeal of—36 Vic. ch. 48, sec. 254.]—Where a by-law had been passed by a Municipal Corporation, creating a debt, and before the debt had been paid it was by a subsequent by-law repealed: Held, that, under 36 Vic. ch. 48, sec. 254, the repealing by-law was invalid, and must be quashed.—Smith and Corporation of Oakland, 295.

See SALE OF LAND—WAYS, 1, 2, 4—WATERCOURSES AND STREAMS.

NEGLIGENCE.

Contributory.]—See RAILWAYS, 4.

See RAILWAYS, 1, 2—TELEGRAPH COMPANY—WAYS, 1.

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NEW TRIAL.

Application for on affidavits—Perjury.]—The plaintiff having recovered a verdict for \$200, for malicious prosecution, a new trial was moved for on affidavits, shewing that the plaintiff and a person called by him, and whose evidence was material, had committed perjury in swearing that this witness was a married sister supported by him, while in fact she lived with him as his wife, and was known as such. The affidavits, however, did not shew that these facts were not known at the trial, and the evidence fully proved the plaintiff's case. The Court refused to interfere.—Chadd v. Meagher, 54.

Granted as a matter of discretion—Right to appeal—Costs.]—See APPEAL.

See PERJURY.

NON-SUIT.

See WAYS, 1.

NOTICE OF DISHONOUR.

Sufficiency of.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

OCCUPATION.

Change of in premises insured.]—See INSURANCE, 2.

Enquire.]—See DEFAMATION.

OVERHOLDING TENANTS.

31 Vic., ch. 26, O.]—Held, HAGARTY C.J., dissenting, that on the evidence set out in this case, the County Court Judge was justified in determining that the tenant was an overholding tenant within the meaning of the Act, 31 Vic. ch. 26, O., and

wrongfully held over without any right or colour of right.

Per HAGARTY, C. J. The intention of the Act was not to empower the County Judge to determine the question of right between landlord and tenant on its merits; but on its appearing that the tenant is holding under a *bona fide* belief of right, which the evidence in this case shewed, he should dismiss the case, and leave the right to be tried in ejectment.—*Gilbert v. Doyle*, 60.

PARLIAMENTARY ELECTION.

See ELECTIONS.

PAROL EVIDENCE.

Admissibility of to explain written document—“*Lumber*”—*Meaning of.*—See CONTRACT, 3.

PARTNERSHIP.

Bill of exchange—*Acceptance by one partner for separate debt, and not in partnership name*—*Liability of co-partners.*—Where the plaintiffs, a bank, discounted a bill drawn by one partner, and accepted by him in the name of the firm, the Manager being aware that it was intended by such partner to reimburse himself for moneys which he alleged that he had advanced to the firm, and it appeared that such acceptance was unauthorized by the other partners: *Held*, that the bank could not recover against them.

The partnership name, when the bill was so drawn and accepted, was J. S. W. & Co., and the acceptance was in the name of W. M. & Co.

Held, that this also would have been fatal to the plaintiffs' recovery.—*Royal Canadian Bank v. Wilson et al.*, 362.

PASSENGERS.

Liability of Railway Companies for loss of baggage—See RAILWAYS, 6.

PATENT.

See CROWN LANDS.

PENALTY.

See LIQUIDATED DAMAGES.

PERJURY.

Charge of.—The practice of indicting parties or witnesses for alleged perjury in a civil suit, while proceedings are still pending, disapproved of.—*Chadd v. Meagher*, 54.

See NEW TRIAL.

PLEADING.

C. L. P. Act, sec 97—*Plea of defence arising after suit.*—Under the C. L. P. Act, sec. 97, to make a plea a good plea to the further maintenance of the action, it is sufficient if it disclose on its face matter which arose after the commencement of the action; no formal commencement is necessary.—*McKenzie et al. v. Kittridge et al.*, 145.

Insufficient statement of breach—Departure.—See LANDLORD AND TENANT, 2.

See BILL OF LADING—CHOSE IN ACTION—CORPORATIONS, 1, 3, 4—FRAUD AND MISREPRESENTATION—INDEMNITY—INSURANCE, 2—MALICIOUS ARREST.

PRACTICE.

Defence arising after commencement of suit.—See PLEADING.

See VENIRE DE NOVO.

PREMIUMS.

Acceptance of renewal after time elapsed—Proviso as to insured being in good health—Meaning of.]—See INSURANCE, 1.

Renewal—Acceptance—Effect of.]—See INSURANCE, 2.

PRINCIPAL AND AGENT.

Agents of Foreign Company.]—See CORPORATIONS, 2.

See CONTRACT, 1 — TELEGRAPH COMPANY.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROPERTY PASSING.

See SALE OF GOODS, 1.

PROTESTANT.

Separate Schools.]—See PUBLIC SCHOOLS.

PUBLIC SCHOOLS.

Separate Protestant Schools—Establishment of.]—Held, under C. S. U. C., ch. 65, sec. 3, and ch. 64, sec. 40, that the by-law of a township council authorizing the establishment of a Protestant separate school, on the ground that the teacher of the public school is a Roman Catholic, does not come into effect or the school into existence, until the 25th December following.

Held, also, that the appointment of a Protestant teacher to the public school before that day enabled the municipality to repeal the by-law, but did not, of itself, put an end to the separate school.

No return was made by the local superintendent, under sec. 13 of ch. 65, of the supporters of the separate school for the preceding six months, to the public school trustees; and they, acting under the assessment roll for the year, where all the ratepayers of the section were entered, including the separate school supporters, of whom the plaintiff was one, levied a rate on all in the section for teacher's salary and other ordinary expenses of the public school, and also the amount payable within the year of the cost of a new school-house, the construction of which was undertaken before the 25th December, and issued a warrant for its collection to defendant, their collector. The plaintiff brought detinue for his property seized under this warrant, and the above facts were stated in a special case without pleadings,

Held, that the public school trustees were not bound to exclude the names of the separate school supporters from their rate, as they had not notice of any exemptions, either by a return from the local superintendent or the assessment roll.

Held, also, that under ch. 65, sec. 8, the supporters of the separate school were liable for the public school rates for the new school-house, as it was undertaken before the separate school was established; but that this portion of the levy being correct would not make valid the whole levy, which was for one sum or rate, including several items.

Held, also, that the fact of the separate school having received a share of the legislative school grant could not affect the case.

Held, also, though there were no formal pleadings, that the defendant

was not protected, as having acted under a warrant, apparently lawful, but that he must be considered an actor, and must shew a title to the property.

Semble, that separate Protestant school trustees have no power to build school-houses or impose rates therefor.

Quere, as to the meaning of "school-rolls" in sec. 14 of ch. 65. — *Free v. McHugh*, 13.

QUIET ENJOYMENT.

Covenant for — Demise.] — See LANDLORD AND TENANT, 4.

RAILWAY ACT OF 1868.

See RAILWAYS, 3.

RAILWAYS.

1. *R. W. Co.—Liability for loss of luggage—Evidence.*]—The plaintiff, an intending passenger by the defendants' railway, a quarter of an hour before the train started, entered a passenger car standing at the station at the original starting point, left his valise on a vacant seat, and went out; and on his return shortly afterwards, his valise was gone. It was not shewn that at the time he left the valise any one was in charge of the train, or that there was any other passenger in the car.

Semble, that there was no sufficient delivery of the valise to defendants to render them liable.—*Kerr v. Grand Trunk R. W. Co.*, 209.

2. *6 Anne ch. 31, 14 Geo. III., ch. 78—Construction of—Evidence.*] — In an action against a railway company for negligently allowing dry wood and other combustible matter to accumulate on their land, which was set on fire by their engine, and extended to plaintiff's

property: *Held*, that defendants were not protected by the statutes 6 Anne ch. 31, and 14 Geo. III. ch. 78.

The authorities upon this question reviewed. Per GWYNNE, J.—The statutes are not excluded in all cases where the fire is caused by negligence, but they do not apply where it has been intentionally lighted by defendant.

Held, under the circumstances of this case, set out in the report—the railroad having been recently built through the forest, and the plaintiff's land being in a state of nature—that there was no sufficient evidence of negligence on the defendant's part, and a second verdict having been found for the plaintiff, a new trial was granted.—*Jaffrey v. Toronto, Grey, and Bruce R. W. Co.*, 271.

3. *R. W. Co.—Employment of agent—Contract under seal.*]—*Held*, under 34 Vic. ch. 48, the Act incorporating the Ontario and Quebec R. W. Co., and the Railway Act of 1868, that the defendants were empowered to appoint an agent to negotiate for and obtain municipal aid, and that for that purpose a resolution of the board of directors, or any entry or minute in their record or proceedings would have been sufficient, without the formality of a by-law or the seal of the company.

The plaintiff sued defendants for services performed by him as their agent in obtaining bonuses from the different municipalities through which the defendants' railroad was to pass, and the only evidence of his appointment was a letter written by one of the directors, stating that at a meeting of the board he was directed to make arrangements with the plaintiff to proceed forthwith.

It was shewn also that the president had recognized and adopted his services, and partially paid therefor: *Held*, that this was not sufficient proof of the plaintiff's engagement, or of the acceptance of his services by the company; but a new trial was granted without costs, to enable him to supply proper evidence if possible.—*Wood v. Ontario and Quebec R. W. Co.* 334.

4. *R. W. Co.—Blowing off steam at highway crossing—Liability for*.—While defendants' servants were employed in the attempt to replace on the track one of defendants' engines which had run off it near a highway crossing, but within defendants' grounds, the female plaintiff, with another woman, approached the crossing with a horse and waggon, and asked defendants' servants if they might cross, when one of them said yes, and then one winked at the other and laughed. While she was crossing, she herself holding on to the horse by the head, and the other woman sitting in the waggon holding the reins, steam was let off through the sides of the engine, and the horse becoming frightened knocked down the female plaintiff and injured her.

Held, an actionable wrong, for which the defendants were liable.

Held, also, that there was clearly no evidence of contributory negligence, as every precaution was used in crossing.

Semble, that even if the act was an unnecessary and wanton act on the part of defendants' servants, the defendants would still be liable, for it was done in the course of their (the servants) service and employment, and for the purpose, though ignorantly, of promoting the object of it.—*Stott et ux. v. Grand Trunk R. W. Co.*, 347.

5. *R. W. Co.—Liability of, for improper state of railway crossing*—4 *Wm. IV.*, ch. 29, sec. 9.]—The rails of defendants' track where it crossed a highway projected from eight to nine inches above the level; and while the plaintiff with a pair of horses and waggon was crossing over, an engine standing close by whistled to give notice of the train starting. This caused the horses to start forward, striking the waggon against the projecting rails and breaking the whipple-tree, in consequence of which the horses ran away and one of them was injured.

Held, that defendants would not be liable if the whipple-tree was broken by the sudden starting of the horses without reference to the state of the track, for it was not proved that the blowing of the whistle was an unnecessary and unlawful act; but that if the accident happened through the defective state of the track they would be liable; and the case should have been left to the jury, without any evidence on the plaintiff's part to shew what the state of the highway was before the defendants' railway intersected it.—*Thompson v. Great Western R. W. Co.*, 429.

6. *R. W. Co.—Liability as carriers—Evidence*.]—The plaintiff shipped a number of bundles of iron by defendants' railway from Montreal to London, subject to a condition that on its arrival, and on being detached from the train, the delivery was to be complete and the liability of the defendants to terminate. On the arrival of the iron the defendants forthwith sent the plaintiff advice notes of its arrival, on which were endorsed the above condition, and from which it would appear that all the iron

had arrived; and requested him to send for it without delay, and that it thenceforth remained at his risk. The plaintiff, who was the ticket clerk at the London station, during all the time that the iron was there, saw the iron and could have counted the bundles and have seen that they were correct. Instead, however, of doing so and taking it away, he allowed it to remain in a place where, by an arrangement which had existed for some years between him and defendants, it was accustomed to be placed free of charge and for his sole convenience, and where he was enabled, from time to time, to send for and take such portions as he required.

Held, that under these circumstances the defendants were not bound to shew that all the iron shipped had in fact arrived: that therefore no liability would attach upon them for an alleged deficiency; and, at all events, that this point could not now be raised, as it was not taken at the trial.—*Taylor v. Grand Trunk R. W. Co.*, 582.

Contract for building—Sub-contract.—See WORK AND LABOUR, 1.

RATE.

Separate Protestant schools.—See PUBLIC SCHOOLS.

RECORD OF ACQUITTAL.

In action for malicious prosecution—How obtained.—See INDICTMENT.

REGISTRATION.

Of certificate of payment of stock.—See CORPORATIONS, 1, 3.

RENEWAL.

Insurance premiums—Acceptance of—Effect of.—See INSURANCE.

RENT RECEIPT.

Effect of—Property passing.—See SALE OF GOODS, 1.

REPLEVIN.

Timber license—Renewal of—Timber cut on limits taken by wrongdoer—Identity of logs.—The plaintiffs were in possession of certain timber limits under a license from the Crown, which expired in April, 1872, but it was the practice of the Crown Lands Department to recognize the right of licensees to a renewal, and a renewal was granted to the plaintiffs for 1872-73, and the ground rent paid in advance, the plaintiffs remaining in possession. In consequence, however, of some difficulty about the boundaries, the license did not issue until the 5th of April, 1873, but it was stated to cover the period between the 20th of June previous. During this period, certain persons, under whom defendant claimed, entered upon the land and cut a quantity of saw logs; and on the plaintiffs going to where they were lying in a creek or river on their limit for the purpose of marking them, they were forcibly prevented by defendant, who opened an artificial dam and caused the logs to be floated down the river, where they got mixed with some of defendant's logs. The plaintiff then went to where the logs were, and selected the logs in question, being of the same size and description as his own logs, and marked them.

Held, that the plaintiff might maintain replevin: that there was sufficient evidence of identity; and that at all events, as the defendant's own wrongful act was the cause of any difficulty, he could not object on this ground.

The plaintiffs being in possession, though they might have no title as against the Crown, could maintain replevin against a wrongdoer. — *Gilmour et al. v. Buck*, 187.

REPRESENTATION.

See FRAUD AND MISREPRESENTATION

RESOLUTION.

Corporation — Appointment of agent.]—See RAILWAYS, 3.

RIGHT OF ENTRY.

Trespass—Patentee of the Crown may maintain without entry.]—See CROWN LANDS.

Condition in lease—Right of entry for breach.]—See LANDLORD AND TENANT, 6.

RIGHT OF WAY.

See WAYS, 3.

ROAD ALLOWANCE.

Sale of mineral rights in.]—See SALE OF LAND.

RULES OF COURT.

228, 299, 300, 498, 499.

SALE OF GOODS.

1. "*Rent receipt*"—*Effect of—Property passing.*]—The plaintiffs, who were piano manufacturers, offered to sell to M. a piano for \$300, and to accept certain approved notes in payment. The piano was left with M., but this negotiation fell through, and it was then agreed that M. might have the piano on giving his notes at 1, 12, and 24 months, for \$100 each. These notes were sent to M., with a "*Rent Receipt*," both of which were signed by him

and returned to the plaintiffs. By the rent receipt, M. was to have the piano on hire at \$6 per month, for three months, payable in advance, and M. might purchase it on payment of the notes, with interest. But until the whole of the purchase money was paid, the piano was to remain the plaintiffs' property on hire by M., the plaintiffs to have power to retake possession without demand, on non-payment of any instalment of purchase money or rent in advance, and although part of the purchase money might have been paid or notes given on account thereof. The agreement for sale being conditional, and punctual payment being essential to it. Nothing was paid on the piano as purchase money or rent, and on the 26th January, 1874, the first note having fallen due on the 18th, it was seized under an attachment against M. as an absconding debtor.

Held, that no property in the piano passed to M., that being the intention of the parties, and the legal effect of the instrument: that the arrangement was not objectionable as being contrary to the Chattel Mortgage Act, and therefore the plaintiffs were entitled to the piano as against M.'s creditors. — *Stevenson et al. v. Rice*, 245.

2. *Sale of goods at auction—Entry by clerk—Memorandum in writing—Statute of Frauds.*]—An auctioneer may maintain an action in his own name for goods sold by him at auction; and an entry by his clerk, who attended the sale, in the sales-book, is a sufficient memorandum of the contract within the Statute of Frauds.

In this case the sales-book consisted of a file of sales-books, or sheets, fastened in a book, on the inside of which the conditions of

sale were written, and at the end of the conditions it was stated that the terms of payment would be found at the head of each sale. At the head of the sheet in this case was the following: "Sale of groceries, wines," &c., "at the Mart, on Tuesday, the 19th December, 1873." The terms of payment were then given, and the entry of the sale was as follows: "Morrison—3 cases Booth & Co.'s gin, Terry, \$5.25 — — — \$15.75; and the evidence shewed that the name Morrison was that of the seller, and Terry of the purchaser.

Held, that the conditions of sale sufficiently referred to the sales-book or sheet, and that the evidence sufficiently shewed who was the seller and who the purchaser, so as to satisfy the statute.—*Coate v. Terry*, 571.

Commission on.]—See CONTRACT, 1—LANDLORD AND TENANT, 3.

SALE OF LAND.

Breach of agreement — Nominal damages—Sale of mineral rights in road allowance—Municipal Act, secs. 441, 442—Construction of.]—The plaintiffs and defendant entered into a joint adventure to form a company to work a mine in land forming part of a township road allowance, the defendant to form the company, and the plaintiffs to vest in the company the title to the mineral rights in the land. The plaintiffs accordingly procured a by-law to be passed by the municipality for the sale of the mineral rights, under sec. 442 of the Municipal Act, which authorizes such sale, but with the proviso that the public travel should not be interfered with. A conveyance containing the above proviso was, with the defendant's

consent, made to one R. B. J., who executed a formal declaration of trust of one-third interest to the plaintiffs, but not of the balance; but he stated that he held the whole land in trust for plaintiffs, and was willing to convey as they directed, and the plaintiffs informed defendant that they were ready to convey to him. The defendant obtained an Act incorporating a company to work the mine and issue stock, which company proved a failure, but through no default of defendant who was the heaviest loser of all the parties interested. The plaintiffs having sued the defendant for not forming the joint stock company or carrying on mining operations and having obtained a verdict for \$400: *Held*, that the verdict must be reduced to nominal damages.

Held, also, that the conveyance by the municipality of the mineral rights, under sec. 442, was sufficient, and that sec. 441 for stopping up of a road allowance did not apply.

Held, also, that although the conveyance of the mineral rights was to R. B. J., the defendant could not urge that he could not be compelled to convey, owing to the absence of any writing; and that the plaintiffs, having control of the title, were in a position to aver and affirm their readiness to perform the agreement.—*Johns et al. v. Beck*, 219.

See DIVISION COURTS, 2.

SCHOOL HOUSES.

Right to erect.]—See PUBLIC SCHOOLS.

SCHOOLS.

Separate protestant—Establishment of.—See PUBLIC SCHOOLS.

SEAL.

Appointment of agent under.]—
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SEPARATE SCHOOLS.

Protestant—Establishment of.]—
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SERVICE.

Personal—Waiver of.]— See
FOREIGN JUDGMENT.

SHIPPING.

See BILL OF LADING.

SHORT FORMS.

Of leases—Act respecting—Con-
struction of.]— See LANDLORD AND
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SIDEWALKS.

Non-repair of—Evidence—Non-
suit.]— See WAYS, 1.

SIGNATURE.

Agreement signed only by party to
be charged—Sufficiency of.]— See
CONTRACT, 2.

SPECIFIC PERFORMANCE.

See LANDLORD AND TENANT, 1.

STAMPS.

Affixing double.]— See BILLS OF
EXCHANGE AND PROMISSORY NOTES,
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See CONTRACT, 2.

STATUTE OF LIMITATIONS

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STATUTES, CONSTRUCTION OF.

6 Anne, ch. 31.]—See RAILWAYS, 2.
8 Anne, ch. 14, secs. 6, 7.]—See LANDLORD
AND TENANT, 3.
14 Geo. III. ch. 78.]—See RAILWAYS, 2.
4 Wm. IV. ch. 29, sec. 9.]—See RAIL-
WAYS, 5.
12 Vic. ch. 84, sec. 22.]—See WAYS, 4.
14 & 15 Vic. ch. 8.]—See LANDLORD
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16 Vic. ch. 253, secs. 10, 17, 20.]—See
CONTRACT, 1.
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34, 35, 46.]—See CORPORATIONS, 1.
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14.]—See PUBLIC SCHOOLS.
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32 & 33 Vic. ch. 21, sec. 43, D.]—See
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33 Vic. ch. 19, O.]—See BILL OF LADING.
34 Vic. ch. 48, D.]—See RAILWAYS, 3.
35 Vic. ch. 12, O.]—See CHOSE IN
ACTION.
35 Vic. ch. 16, O.]—See MARRIED
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36 Vic. ch. 48, secs. 441, 442, O.]—See
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37 Vic. ch. 47, sec. 2, D.]—See BILLS OF
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STATUTORY FORMS.

Compliance with.]—See LANDLORD AND TENANT, 4.

STOCKHOLDERS.

Liability of]—See CORPORATIONS, 1, 3, 4.

STOVEPIPE.

Passing through adjoining house—Easement.]—See EASEMENT.

STREAMS.

See WATERCOURSES AND STREAMS.

SUPERIOR COURTS.

Power of, where inferior Courts punish for contempt.]—See CONTEMPT OF COURT.

TENDER.

Evidence of, or dispensation with.]—In order to constitute a legal tender, the money must either be produced and shewn to the creditor, or its production expressly or impliedly dispensed with.

Where, therefore, to prove a tender of a quarter's rent, for which the defendant had distrained, the evidence shewed that the tenant, after refusing to pay some charges and costs which the landlord claimed in addition to the rent, said to the landlord, "Here is the rent,"—which he had, and told the landlord he had, in his right hand in a desk,—but did not produce it or shew it to the landlord, who said nothing and left the premises: *Held*, that there was no evidence of a tender, or of a dispensation with a tender.

Per GWYNNE, J.—To divest a landlord of his right to distrain, a strict legal tender must be shewn.—*Matheson v. Kelly*, 598.

Of lease for execution—When necessary.]—See LANDLORD AND TENANT, 2.

TELEGRAPH COMPANY.

Principal and agent—Telegraph Co.—Liability of.]—*Held*, that a contract may be made, through the medium of an agent, with a telegraph company for the transmission of a message; and where the principal sustains loss through the negligence of the company, he may maintain an action against them therefor.

The person to whom a telegram was sent by his agent was held entitled to sue the telegraph company for negligence in the transmission of it.—*Feaver v. Montreal Telegraph Co.*, 258.

TENANT.

Overholding.]—See OVERHOLDING TENANT.

For life—Right to cut timber.]—See WASTE.

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THREATENING LETTERS.

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TIMBER.

Identity of, cut on limits by wrongdoer.]—See REPLEVIN.

Right of tenant for life to cut.]—See WASTE.

TIMBER LICENSE.

Renewal of.]—See REPLEVIN.

TRADE.

Goods sent to be repaired—Exemption from distress.]—See LANDLORD AND TENANT, 3.

TRANSCRIPT.

Of Division Court judgment to County Court.] — See DIVISION COURTS, 2.

TRESPASS.

Evidence.] — Where defendant, having obtained the issue of a warrant, interfered personally in the arrest, telling the constable to have the plaintiff taken away, or right away. Held, sufficient to support a verdict on a count in trespass.—Stephens v. Stephens, 424.

Right of patentee of the Crown to maintain without entry.] — See CROWN LANDS.

TROVER.

For collaterals, where principal debt paid.] — See COLLATERAL SECURITY.

UNLIQUIDATED DAMAGES.

See FRAUD AND MISREPRESENTATION, 1.

VALUATION.

Condition precedent to granting lease.] — See LANDLORD AND TENANT, 2.

VENIRE DE NOVO.

Where a declaration contained two counts, one of which was good, and the other bad, and the verdict general, the Court refused to arrest the judgment, but granted a *venire de novo*.— *Stephens v. Stephens, 424.*

VERDICT.

Setting aside where appearance unauthorized.] — See APPEARANCE.

WAGES.

Right of married woman to sue for wages.] — See MARRIED WOMAN, 1.

WAIVER.

Of personal service.] — See FOREIGN JUDGMENT.

Of objections to discharge in insolvency.] — See INSOLVENCY.

Of forfeiture of policy.] — See INSURANCE, 1, 2.

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Of Distress.] — See INDEMNITY—LANDLORD AND TENANT.

Arrest under — Liability of defendant.] — See TRESPASS.

WARRANTY.

On sale of vessel — Evidence.] — See FRAUD AND MISREPRESENTATION, 2.

WASTE.

Tenant for life — Right to timber.] — Held, that it is not waste, in a tenant for life, to cut down timber on wild land for the sole purpose of bringing it into cultivation, provided the inheritance be not damaged thereby, and it is done in conformity with the rules of good husbandry.—Drake v. Wigle, 405.

WATERCOURSES AND STREAMS.

Clearing out — Liability of municipal corporations — C. S. U. C., ch. 54, sec. 277 — Construction of.] — In 1859 the defendants, assuming to act under the Municipal Act of 1858, C. S. U. C., ch. 54, sec. 277, passed a by-law requiring persons to clear out all obstructions in streams across

their lots; and providing that the council, in their discretion, might do the work and levy the cost thereof by special rate on the lands; and imposing penalties, &c. The defendants cleared a stream on and above the plaintiff's land, and assessed him as a non-resident for \$75, the amount expended on his lot, which he paid. They did not, however, clear the stream on the lot below, nor compel the occupant to do so, whereby in times of freshet increased quantities of water were brought down and dammed back on plaintiff's land, injuring his crops, instead of lying, as before, in the woods above and gradually evaporating and passing away, without doing him any injury.

Held, that no action would lie against defendants, either for not clearing out the stream themselves, or for not compelling the owners to do so; and, therefore, that they were not liable to the plaintiff for the damage sustained by him.—*Danard v. Corporation of Chatham*, 590.

WAYS.

1. *Sidewalk—Action for not repairing—Evidence—Nonsuit.*—The plaintiff, while walking along one of the streets of a village, tripped on a hinge which projected about two inches above the level of a trap door in the sidewalk, and in endeavoring to recover himself caught his other foot in a depression in the woodwork, about an inch and a quarter deep, at the opposite corner of the trap door, and fell and injured his leg. It appeared that but for the hinge the accident would not have happened, and it was admitted at the trial that the state of the hinge was no evidence of negligence: *Held*, that

there was no evidence of negligence on the part of defendants, and that the plaintiff was properly nonsuited.—*Ray v. Corporation of Petrolia*, 73.

2. *Highways—Dedication—Evidence of.*—Where in or prior to the year 1822, a lane or alley was laid out by the owner, connecting with two public highways, and which had been used by the public ever since, without any interruption from the owner during his lifetime, a period of forty years: *Held*, that this, apart from the other evidence set out below, was sufficient evidence to go to the jury of an intention by the owner to dedicate the lane in question to the public.

Held, also, that a deed, executed by the owner, of a lot abutting on the lane, in which the limits of the lane were given, might be referred to to ascertain its true width.

Held, also, that the public were entitled to the whole width of the lane: that evidence of enjoyment by them of the part in dispute was not essential; and that an obstruction by a person who knew he was obstructing a street already laid out, cannot afford any evidence to displace the intention of dedication by the owner.—*Regina v. Donaldson et al.*, 148.

3. *Right of way.*—*Held*, that the cases of *Johnson v. Boyle*, as reported in 8 U. C. R., 142, and 11 U. C. R. 101, taken in connection with the evidence given in this case, and set out in the report, only established a right of way in the plaintiff over the east half of lot 23, in the 9th concession of Markham, to the concession line between the 8th and 9th concession, but none over the west half of the lot.—*Walsh v. Johnson*, 367.

4. *Road constructed by Joint Stock Company—Right of municipality to remove obstructions upon—* 12 Vic. ch. 84, sec. 22—*Construction of.*—*Held*, that the special rights and privileges conferred on the St. Catharines, Thorold, and Suspension Bridge Road Company, who had constructed their road over what had previously been a highway, under 12 Vic. ch. 84, sec. 22, did not take away the general powers possessed by the municipalities through which it passed, as to the removal of obstructions.

Where, therefore, the defendant was convicted by the police magistrate of the town of Clifton for unlawfully encumbering a street in the said town, being a portion of the road in question, by placing and leaving thereon a cart used by him for taking likenesses, contrary to a by-law of the said town, the Court sustained the conviction.—*Regina v. Davis*, 575.

Sale of mineral rights in.—*See* SALE OF LAND.

See RAILWAYS, 4.

WILD LAND.

Right of tenant for life to cut timber on.—*See* WASTE.

WILFUL IGNORANCE.

See ELECTIONS, 1.

WITNESSES.

Competency of husband in action by wife.—*See* MARRIED WOMAN, 1.

Indicting for perjury.—*See* NEW TRIAL—PERJURY.

WORDS, CONSTRUCTION OF.

"Demise."—*See* LANDLORD AND TENANT, 4.

"Lumber."—*See* CONTRACT, 3.

"Right or colour of right."—*See* OVERHOLDING TENANT.

"School rolls."—*See* PUBLIC SCHOOLS.

"Subject to the following stipulations."—*See* LANDLORD AND TENANT, 6.

WORK AND LABOUR.

1. *Contract for building railway—Sub-contract—Construction.*—The defendant had a contract with the Midland Railway Company, for the construction of about fifty miles of their railway, and plaintiff was the assignee of a sub-contractor under the defendant for about four miles. By the plaintiff's contract all payments based on the certificates of the company's engineer were to be made monthly, and within ten days after defendant received the amount coming to him from the company; but defendant was to retain ten per cent. of such monthly estimates as a security for the plaintiff's due completion of the work to the satisfaction of defendant and of the company's engineer, which, with any balance coming to the plaintiff on a final estimate, was to be paid to him within thirty days after the work was accepted by the company, and defendant paid therefor; and the suspension of the works by the company should not give defendant a claim for damages, but only for defendant's default in furnishing the estimates or paying them when paid by the company, or for any delay caused by the suspension, but he should be paid for the work actually done by him. The plaintiff's work was all completed and accepted by the company, and he claimed \$1510.36, \$719.61 for per-

centages retained by defendant up to the 31st December, 1872, which the jury found that defendant had received from the company, and \$790.75, for work done after that date, for which defendant had not been paid, but the jury found that the company had put an end to defendant's contract with them owing to his default.

Held, that the plaintiff was entitled to recover the whole amount claimed by him; for 1. As to the sum of \$719.61, the defendant had received this from the company, and the fact that they had not paid defendant for the work on other sections could form no defence. 2. As to the sum of \$790.75, per HAGARTY, C. J., that the non-payment by the company being caused by the defendant's own default, he could not take advantage of it under the letter of the contract, as a defence to the action. Per GALT, J., that, in addition to the defendant being thus precluded, the plaintiff, by the express terms of the contract, was to be paid, in case of suspension by the company, for the work actually done by him.—*McBrien v. Shanly*, 28.

2 *Building contract—Joint or several—Separate contracts by different tradesmen—Delay.*—The specifications for a dwelling house to be built, stated the work to be done under different heads, mason, carpenter, &c.; and contained a condition that the building must be completed by the 15th June, under a penalty of \$20 per week as liquidated damages.

The contract, based upon separate tenders by the different tradesmen signing it, was as follows: "We, the undersigned, hereby agree to build, erect, complete, and finish the dwelling house, &c., mentioned

in the foregoing specifications, for the respective sums hereinafter specified by the time mentioned in the condition of said specifications, and according to the following trades." The trades with the contract price for each were then set out, a space being left after each for the respective contractors to sign their names; and the plaintiff thus contracted for the carpenter and joiner's work. *Held*, a several contract between each tradesman and the defendant, not a joint contract with all. *Held*, also, that there was an implied contract by defendant with each contractor that he should not be wrongfully or unreasonably delayed in carrying out his contract; but that where the brick work was necessarily delayed by reason of the frost, and the plaintiff's work was thereby impeded, defendant was not responsible.—*Lee v. Bothwell*, 109.

3. *Special contract not performed—Acceptance—Right to recover on common counts.*]—The plaintiffs agreed to put up three hoists, to raise and lower goods, in four wholesale warehouses which defendant was building. The specifications required them to be "capable of raising a weight of 2000 lbs. without risk." and the plaintiffs' offer, which defendant accepted, was to make them according to the plans and specifications, and to the satisfaction of defendant's architects, the same as in certain other warehouses named. They were put in in June, and the defendant's tenants went in in the same month. On the 31st August defendant's architects wrote to the plaintiffs requiring them to remove them, and put in others, and the plaintiffs then made some improvements, which

were completed in December. After the alterations were completed there was no evidence either of a refusal to accept or of any direct acceptance, and defendant denied that there was an acceptance, but the hoists remained in the warehouses, and were used by the tenants until the 13th February following, when the whole premises with everything in them were destroyed by fire. The defendant had left the country in January, and did not return until after the fire. The architect, who was called as a witness, said that he never had been satisfied with the hoists.

Held, reversing the decision of the Court below, STRONG, J., dissenting, that the user of the hoists by the defendant's tenants up to the time of the fire, formed evidence of acceptance, so as to entitle the plaintiffs to recover their value under the common counts. Per PATTERSON, J., the special contract was complied with so as to entitle the plaintiffs to recover.

Held, also that "capable of raising a weight of 2000 lbs. without risk," meant strength enough to

lift and sustain such a weight during the lifting, and that defendant could not insist upon this being done with the application of any specified power. Per STRONG, J., that these words must be read in connection with the words, "to the satisfaction of defendant's architects," which latter words meant that the judgment of the architects was to take the place of any specification as to power. Per PATTERSON, J., the satisfaction of the architects was to be with the performance of the contract as properly construed, and such satisfaction was a question of fact not necessarily to be shewn by an express declaration or certificate of the architects.—*Hamilton et al. v. Myles*, (in appeal), 309.

Rent to be paid by—Right to recover for, after eviction.—See LANDLORD AND TENANT, 1.

See FRAUD AND MISREPRESENTATION.

WRONG-DOERS.

Contribution among.—See INDEMNITY.

See REPLEVIN.

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